183-411

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 189.

ASAHEL GAGE, APPELLANT,

vs.

ELLIS KAUFMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 17, 1889.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Friday, the twenty-sixth day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

ELLIS KAUFMAN
vs.
ASAHEL GAGE. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the first day of October, in the adjourned October term of said court, 1883, in the record of the proceedings thereof in said above-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ELLIS KAUFMAN
vs.
ASAHEL GAGE. } In Chancery.

On motion of defendant's solicitor, leave is hereby given said defendant to file and docket a transcript herein in said cause.

2 On the same day, to wit, on the first day of October, 1883, came the defendant, by his solicitor, and filed in the office of the clerk of said court a bond for costs and a transcript of record from the superior court of Cook county, Illinois, in said entitled cause; which said bond and transcript are respectively in the words and figures following, to wit:

Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court. October Term, A. D, 1883.

ELLIS KAUFMAN
vs.
ASAHEL GAGE. } In Chancery.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and, in default of payment by the defendant of any costs ordered or adjudged to be paid by him, I

hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 1st day of October, A. D. 1883.

AUGUSTUS N. GAGE.

Endorsed: Filed Oct. 1, A. D. 1883. W. H. Bradley, clerk.

3 Be it remembered that heretofore, to wit, on the 7th day of June, in the year of our Lord one thousand eight hundred and eighty-three, there were filed in the office of the clerk of the superior court of Cook county a certain bill of complaint and affidavits of non-residence, which are in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

To the honorable the judges of the superior court of Cook county, in chancery sitting:

Ellis Kaufman, as plaintiff, brings this his bill against Asahel Gage, as defendant, and says that he, said plaintiff, is seized in fee simple of lots 1, 2, 3, 4, 5, 6, 7, 8, and of the private alley north of said lot 7 of McKay's subdivision of lots 1 to 6, inclusive, in block 3 of Sutton's addition to Chicago, being part of northeast quarter of southeast quarter of section 18, in township 39 north, range 14 east, of the third principal meridian, situate in the county of Cook and State of Illinois; that the defendant pretends and claims pretended title to said lands, the precise nature of which is to this plaintiff unknown, but which defendant pretends to comprise some sort of proceedings, judgments, notice, and deeds by some person or persons out of possession conveying said premises or some lien thereon to said defendant, the further particu-
4 lars of which and the exact extent of said defendant's claims this plaintiff cannot state, but the plaintiff shows that by said pretenses and claims of said defendant the title of said plaintiff is so unsettled and clouded that he is unable to sell said lands for its value or to enjoy and possess the same free and clear from clouds and incumbrances, as he has the right to do. To the end, therefore, that the said defendant may full, true, direct, and perfect answer make to all and singular the matters aforesaid; and may set forth and state each and every particular of his said claims and of all papers, documents, and matters on which the same are founded, and that the title of this plaintiff to said premises may be quieted, and that he may have such other or further or different relief in the premises as equity may require, may it please the court to summon said defendant to answer, &c.

ELLIS KAUFMAN,
By His Att'y.

EDWARD ROBY,
Solicitor and of Counsel.

Affidavit of Non-Residence.

5 In the Superior Court of Cook County. In Chancery.

ELLIS KAUFMAN
vs.
ASAHEL GAGE.

Edward Roby, solicitor for plaintiff, being duly sworn, says that said defendant, Asahel Gage, does not reside in the State of Illinois, but his residence is at Vineland, Cumberland county, in the State of New Jersey.

Sworn to before me this 7th day of June, A. D. 1883.

EDWARD ROBY.

JNO. J. HEALY, *Clerk.*

And on the day and year last aforesaid, to wit, June 7th, A. D. 1883, there issued out of the office of the clerk of said court the people's writ of summons; which writ, with the return of the sheriff thereon endorsed, is in words and figures as follows, to wit:

6 STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Asahel Gage, if he shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the term thereof, to be held at the court-house, in Chicago, in said Cook county, on the first Monday of August next, to answer unto Ellis Kaufman in his certain bill of complaint filed in said court on the chancery side thereof, and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the [SEAL.] seal thereof, at Chicago aforesaid, this 7th day of June, A. D. 1883.

JOHN J. HEALY, *Clerk.*

The within-named defendant not found in my county, this 6th day of August, 1883.

SETH F. HANCHETT, *Sheriff,*
By C. R. MATSON, *Deputy.*

7 And afterwards, to wit, on the 11th day of June, in the year last aforesaid, to wit, A. D. 1883, there was filed in the office of the clerk of said court a certain certificate of mailing notice; which is in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County.

ELLIS KAUFMAN } Bill, 87184.
vs.
ASAHEL GAGE. }

I, John J. Healey, clerk of the superior court of Cook county, in and for said county, in the State of Illinois, do hereby certify that on the 11th day of June, A. D. 1883, I sent by mail a notice, a copy of which is hereto attached, marked Exhibit "A," to the following defendant, and addressed as follows: One copy to Asahel Gage, Vineland, Cumberland Co., New Jersey.

JOHN J. HEALY, *Clerk.*

EXHIBIT "A." Edward Roby.

8 *Attorney's Chancery Notice.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County. August Term, A. D. 1883.

ELLIS KAUFMAN } In Chancery. No. 87184.
vs.
ASAHEL GAGE. }

Notice is hereby given to the said Asahel Gage that the above-named complainant heretofore filed his bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued out of said court against the above-named defendant, returnable on the first day of the term of the superior court of Cook county, to be held at the court-house in Chicago, in said Cook county, on the first Monday of August (1883), as is by law required, and which suit is still pending.

JOHN J. HEALY, *Clerk.*
EDWARD ROBY,
Compl't's Sol'r.

And afterwards, to wit, on the 8th day of August, A. D. 1883, there was filed in the office of the clerk of said court a certain appearance, petition, and bond; which are in words and figures following, to wit:

9 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

ELLIS KAUFMAN } In Chancery.
vs.
ASAHEL GAGE. }

I hereby enter the appearance of Asahel Gage to the above-entitled cause.

ASAHEL GAGE,
By AUGUSTUS N. GAGE,
His Solicitor.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, to the August Term, A. D. 1883.

ELLIS KAUFMAN }
vs. }
ASAHEL GAGE. }

Petition for Removal to the Circuit Court of the United States for the Northern District of Illinois.

To the honorable the judges of said superior court, in chancery sitting:

Your petitioner, Asahel Gage, respectfully shows that he is the defendant in the above-entitled suit; that at the time of the commencement of said suit he was and still is — citizen and resident of the State of New Jersey; that the said complainant, the said
10 Ellis Kaufman, was at the time of the commencement of said suit and still is — citizen and resident of the State of Illinois, as this affiant verily believes.

Your petitioner further states that in the said suit there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between the said Ellis Kaufman, who is — citizen and resident of the State of Illinois, and your petitioner, who is — citizen and resident of the State of New Jersey.

Your petitioner further states that said suit was commenced in this court on or about the 7th day of June, A. D. 1883; that the term of said court at which the same could be first tried is the September term, A. D. 1883, thereof, and that the matter and amount in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

And your petitioner offers herewith a bond, with a good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that the said surety and
11 bond may be accepted, and that an order may be made and entered by this honorable court herein removing said suit into the said circuit court of the United States for the northern
12 district of Illinois according to the statutes of the United States in such case made and provided.

And your petitioner will ever pray, &c.

ASAHEL GAGE,
By AUGUSTUS N. GAGE,
His Att'y-in-Fact.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Augustus N. Gage, being duly sworn, say that I am the attorney-in-fact of petitioner, Asahel Gage; that I have read the foregoing petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

AUGUSTUS N. GAGE.

Subscribed and sworn to before me this 8th day of August, 1883.

EUGENE R. COX,
[SEAL.] *Notary Public, Cook Co., Ill.*

13 & 14 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, Illinois.

ELLIS KAUFMAN } In Chancery.
v.
ASAHEL GAGE. }

Know all men by these presents that we, Asahel Gage, of the county of Cumberland and State of New Jersey, and Henry H. Gage, of the county of Cook and State of Illinois, are held and firmly bound unto Ellis Kaufman in the sum of five hundred dollars, good and lawful money of the United States of America, to be paid to the said Ellis Kaufman or to his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, firmly, and severally, by these presents.

Sealed with our seals and dated this eighth day of August, A. D. 1883.

The condition of the above obligation is such that whereas Ellis Kaufman has filed with the clerk of the superior court of Cook county, Illinois, a bill of complaint against the above-bounden Asahel Gage; and whereas as the said Asahel Gage is a non-resident of the State of Illinois, and resides in the State of New Jersey; and whereas
as the said Asahel Gage has filed with the clerk of the said
15 superior court and in said cause a petition for the removal of said cause to the circuit court of the United States for the northern district of the State of Illinois:

Now, therefore, if the said Asahel Gage shall enter in the said circuit court on the first day of its next session a copy of the record of said suit and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

ASAHEL GAGE, [SEAL.]
By AUGUSTUS N. GAGE, [SEAL.]
His Attorney-in-Fact. [SEAL.]
HENRY H. GAGE. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John J. Healy, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause pending in said court on the chancery side thereof, wherein Ellis Kaufman — complainant and Asahel Gage defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 24th day of August, A. D. 1883.

[SEAL.] JNO. J. HEALY, *Clerk.*

16 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John A. Jamison, chief justice of the superior court of Cook county in and for said county and State of Illinois, do hereby certify that John J. Healy, whose name is subscribed to the foregoing certificate of attestation, now is and was at the time of signing and sealing the same the clerk of said superior court of Cook county and keeper of the seal and records thereof, duly elected, commissioned, and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all courts of record in the United States and elsewhere, and that his attestation is in due form of law and by the proper officer.

Given under my hand and seal, at Chicago, in said county, this 24th day of August, A. D. 1883.

JOHN A. JAMISON,

[SEAL.] *Chief Justice of the Superior Court of Cook County.*

Endorsed: Filed Oct. 1st, 1883. Wm. H. Bradley, clerk.

17 Afterwards, to wit, on the twenty-ninth day of October, 1883, came the defendant, by his solicitor, and filed in said clerk's office his demurrer to the bill of complaint in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of the State of Illinois.

ELLIS KAUFMAN } In Chancery.
vs.
ASAHEL GAGE. }

The demurrer of Asahel Gage, the defendant, to the bill of complaint of Ellis Kaufman, the above-named complainant.

This defendant, by protestation, not confessing or acknowledging

any of the matters or things in the said complainant's said bill of complaint contained to be true in such matter and form as the same are therein and thereby set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that the said complainant in and by his said bill of complaint charges and alleges that he is the owner of certain lands and real estate therein described, and that this defendant has or claims to have a title thereto.

And he charges and alleges that in consequence of the title
18 of this defendant his, the complainant's, title to said premises is clouded, and he prays in and by his said bill that his title to the said real estate may be quieted.

And this defendant says that in and by his said bill of complaint it does not appear that the said complainant is in possession of the said lands and premises or that the said lands and premises are vacant and unoccupied or that they are not in the possession of the defendant.

And this defendant says that in this respect the said bill of complaint does not make or state a cause entitling a court of equity to exercise jurisdiction.

And the said bill of complaint does not show that the complainant has not an adequate remedy at the common law in the action of ejectment.

And for a further cause of demurrer this defendant showeth that the complainant hath not in and by his said bill made or stated such a cause as entitles him in a court of equity to any discovery of or relief against this defendant as to the matters and things set forth and alleged in the said bill of complaint or any of the said matters; wherefore and for divers other good causes of demurrer appearing in the said bill of complaint this defendant doth demur thereto, and demands judgment whether he shall be compelled to make any other or further answer to said bill of complaint.

ASAHEL GAGE,
By AUGUSTUS N. GAGE,
His Solicitor.

AUGUSTUS N. GAGE,
Of Counsel.

19 STATE OF ILLINOIS, } ss:
County of Cook, }

Augustus N. Gage, being duly sworn according to law, says that he is the attorney-in-fact for Asahel Gage, and that he has read the foregoing demurrer by him subscribed for the said Asahel Gage and knows the contents thereof, and that the said demurrer is not interposed for delay.

AUGUSTUS N. GAGE.

Subscribed and sworn to before me this 29th day of October, A. D. 1883.

EUGENE R. COX,
[SEAL.] *Notary Public, Cook Co., Ills.*

I hereby certify that, in my opinion, the foregoing demurrer of the defendant, Asahel Gage, to the bill of complaint of the above-named complainant is well founded in point of law.

AUGUSTUS N. GAGE,
Of Counsel for Asahel Gage.

Endorsed: Filed Oct. 29, 1883. Wm. H. Bradley, clerk.

20 On the same day, to wit, on the twenty-ninth day of October, 1883, came the defendant, by his solicitor, and filed in said clerk's office his plea to the bill in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of the State of Illinois.

ELLIS KAUFMAN }
vs. } In Chancery.
ASAHEL GAGE. }

The plea of Asahel Gage, the above-named defendant, to the bill of complaint of Ellis Kaufman, the above-named complainant.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in the matter and form as the same are therein set forth and alleged, for plea to said bill or to so much and such parts thereof as seek discovery from this defendant, and to establish or quiet the said complainant's said title to the premises in the said bill mentioned and described, this defendant says that he is the owner of said lands and premises in fee, claiming title thereto under and through two certain tax deeds:

21 The first of which tax deeds was executed, acknowledged, and delivered to this defendant by Herman Leib, the then county clerk of Cook county, Illinois, on the 29th day of April, 1876, and recorded in the recorder's office, in said Cook county, on the 10th day of July, 1876, in Book 658, at page 303.

And the second of said tax deeds was executed, acknowledged, and delivered to this defendant by E. F. C. Klokke, the then county clerk of Cook county, Illinois, on the 16th day of July, 1879, and recorded in the recorder's office of said Cook county on July 19th, 1879, in Book 869, at page 608.

And this defendant claims and doth and will insist that the said complainant is not entitled in a court of equity to any relief against said tax deeds, except for good cause shown, for irregularities or invalidities therein existing, by the said bill of complaint alleged to exist.

And this defendant says and doth and will insist that the said tax deeds are matters of record and are well known to the said complainant; yet the said complainant hath not in and by his said bill stated any defects or irregularities therein or in either of the said deeds, and has not made a case by his said bill that will authorize a court of equity to set aside or in any manner interfere with the said tax deeds, and that the said bill ought to be by this court dismissed; all which matters and things this defendant doth aver to be true.

22 And he pleads the same in bar to the said complainant's said bill of complaint and humbly prays judgment of this honorable court whether he shall be compelled to make any further answer to the said bill of complaint, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ASAHEL GAGE,
By AUGUSTUS N. GAGE,
His Solicitor.

AUGUSTUS N. GAGE,
Of Counsel.

STATE OF ILLINOIS, } ss:
County of Cook, }

Augustus N. Gage, being first duly sworn according to law, says that he is the attorney-in-fact for the said Asahel Gage, for whom he signed the foregoing plea; that he has read the said plea by him subscribed and knows the contents thereof; that the matters and things therein contained are true, as this affiant verily believes, and that the said plea is not interposed for delay.

AUGUSTUS N. GAGE.

Subscribed and sworn to before me this 29th day of October, A. D. 1883.

[SEAL.]

EUGENE R. COX,
Notary Public, Cook Co., Ills.

I hereby certify that, in my opinion, the foregoing plea of the said defendant, Asahel Gage, to the bill of complaint of the

23 above-named complainant is well founded in point of law.

AUGUSTUS N. GAGE,
Of Counsel for Asahel Gage.

Endorsed: Filed Oct. 29, 1883. -Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-second day of June, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ELLIS KAUFMAN
vs.
ASAHEL GAGE. } In Chancery.

Now come the parties, by their solicitors, and now come on to be heard the demurrer and plea of the defendant to the bill of complaint herein, and, after hearing arguments of counsel, the court overrules said demurrer and adjudges said plea to be sufficient; and thereupon leave is given said complainant to amend his bill.

Afterwards, to wit, on the tenth day of July, 1885, came the complainant, by his solicitor, and filed in said clerk's office his amended bill in said entitled cause; which said amended bill is in the words and figures following, to wit:

24 In the Circuit Court of the United States in and for the Northern District of Illinois.

ELLIS KAUFMAN
vs.
ASAHEL GAGE. } Amendments to Bill.

The defendant having exhibited his plea to the bill in this cause, to wit, on the 29th day of October, A. D. 1883, wherein he alleges that he is the owner in fee of the lands in the bill described, claiming title thereto under and through two certain tax deeds, the first of which tax deeds was executed, acknowledged, and delivered to said defendant — Herman Lieb, the then county clerk of Cook county, Illinois, on the 29th day of April, 1876, and recorded in the recorder's office in said Cook county on the 10th day of July, 1876, in Book 658, at page 303, and the second of said tax deeds was executed, acknowledged, and delivered to said defendant by E. F. C. Klokke, the then county clerk of Cook county, Illinois, on the 16th day of July, 1879, and recorded in the recorder's office of said Cook county on July 19th, 1879, in Book 869, at page 608, afterwards the said plea was, on motion of the plaintiff, set down for argument, and, upon argument, the court allowed said plea, with leave to the plaintiff to amend his bill herein.

25 And thereupon the plaintiff amends his said bill, and respectfully shows unto the court that he, said plaintiff, is seized in fee simple of lots 1, 2, 3, 4, 5, 6, 7, 8, and of the private alley north of said lot 7 of McKay's subdivision of lots 1 to 6, inclusive, in block 3 of Sutton's addition to Chicago, being part of northeast quarter of southeast quarter of section 18, in township 39 north, range 14 east of the third principal meridian, situate in the county of Cook and State of Illinois; that the defendant pretends and claims pretended title to said lands, claiming that he is the owner of said lands and premises in fee under and through two certain pretended tax deeds; that the first of said pretended tax deeds was executed, acknowledged, and delivered to said defendant by Herman Leib, the then

county clerk of Cook county, Illinois, on the 29th day of April, 1876, and recorded in the recorder's office in said county on the 10th day of July, 1876, in Book 658 of Records, at page 303, and that the second of said pretended tax deeds was executed, acknowledged, and delivered to said defendant by E. F. C. Klokke, the then county clerk of Cook county, Illinois, on the 16th day of July, 1879, and recorded in the recorder's office of said Cook county on July 19th, 1879, in Book 869 of Records, at page 608, as by the said plea of the said defendant in this cause pleaded as aforesaid will fully and particularly appear; and said defendant, in and by his
26 said plea by him above pleaded, says and insists that the said pretended tax deeds are matters of record and are well known to this plaintiff.

The following is a true copy of the said record of said pretended tax deed, bearing date April 29th, A. D. 1876, as the same appears in said Book 658 of Records of Cook County at page 303:

STATE OF ILLINOIS, } ss:
Cook County, }

Whereas at a public sale of real estate for non-payment of taxes, made in the county aforesaid on the 30th day of October, A. D. 1872, the following-described real estate was sold, to wit: A triangular piece of land west and adjoining lot forty-seven (47) to fifty (50), block nineteen (19), canal trustees' subd. of north half (N. ½) and north half of southeast quarter (N. ½ S. E. ¼) and east half of southwest quarter (E. ½ S. W. ¼), section thirty-three (33), T. forty (40) N., R. fourteen (14) east, 3rd P. M.

Also at said sale, on the 9th day of November, A. D. 1872, lots one (1), two (2), three (3), four (4), five (5), and six (6), block three (3), Sutton's addition to Chicago.

Also at said sale, on the 8th day of November, A. D. 1872, lot nine (9), block fifty-six (56), in school section addition to Chicago, all situated in said Cook county, State of Illinois.

27 And whereas the same not having been redeemed from said sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Illinois necessary to entitle him to a deed of said real estate:

Now, therefore, know ye that I, Herman —, county clerk of said county of Cook, in consideration of the premises and by virtue of the statutes of the State of Illinois in such cases provided, do hereby grant and convey unto Asahel Gage, his heirs and assigns, fovever the said real estate hereinbefore described, subject, however, to any redemption provided by law.

Given under my hand and the seal of our court this 29th day of April, A. D. 1876.

HERMAN LIEB,
County Clerk.

Said record of said instrument, though void on its face and insufficient to show any conveyance of land, however otherwise supported,

is yet a cloud on plaintiff's titles, because the record may be imperfect through fault of the scrivener in omitting to record a seal of court and in giving the name I. Herman for Herman Lieb in the body of the deed, and the record is only *prima facie* evidence of the original deed.

Section 225 of chapter 120 of the Revised Statutes of Illinois,
28 the law in force at the time the said pretended tax deed was issued and at the time of the pretended sales therein mentioned, is in the words following, to wit:

"Unless the holder of the certificate for real estate purchased at any tax sale under this act, takes out the deed as entitled by law and files the same for record within one year from and after the time for redemption expires, the said certificate or deed and the sale on which it is based shall from and after the expiration of such one year be absolutely null. * * * Certificates of purchase and deeds executed by the county clerk shall recite the qualifications required in this section."

By section 210, the law in force at the time of said pretended sales, the time of redemption expired in two years from the date of such sales, and by the terms of said law said pretended sale of said lots in Sutton's Addition and the certificate of sale thereof became and was, if any such sale and certificate there was, wholly null and void.

But this plaintiff alleges and charges the truth to be that there was no advertisement of any public sale of real estate for the nonpayment of taxes to take place on the 9th day of November, A. D. 1872, in said Cook county, and if any such sale of said lots was made on that day it was without advertisement. There was no judgment or precept on which said lands could have been sold on that day, as your orators are informed and verily believe; there
29 were no taxes unpaid upon said land for which sale could on that day have been made; and these plaintiffs charge that if there was any such sale, as is so falsely pretended, on or about the 9th day of October, A. D. 1872, it was secret, pretended, and fictitious that it was made for pretended taxes, based on pretended and void assessment, without any judgment of any court having jurisdiction of the subject-matter and without any precept from any court of record having jurisdiction to issue such precept. This plaintiff further alleges and charges that no notice to redeem said land from such pretended sale was given by the holder of any certificate of such sale as required by the constitution and statutes of Illinois, and that no such notice or evidence thereof was filed or recorded by the county clerk of Cook county.

By the laws of Illinois such a tax deed as the foregoing, if sealed and complete in all parts, cannot be read as evidence of title alone and is no evidence of the existence of judgment, precept, or affidavits of notice, and except in connection with sufficient affidavits of notice and sufficient and valid judgment and precept such tax deed is not evidence of title, and it is incumbent on any person claiming title through a tax deed to produce and read with it the judgment, precept, and affidavits on which it is predicated.

30 Further, by the laws of Illinois such judgment is not conclusive evidence of the right to sell land thereunder, but if by anything appearing on the record or off the record by investigation of the taxes or other amounts included in such judgment it appears that judgment included any improper or illegal sum, however small, the sale on such judgment is void.

The following is a true copy of the record of said pretended tax deed bearing date July 16th, A. D. 1879, as the same appears in said Book 869 of Records, at page 608:

STATE OF ILLINOIS, } ss:
Cook County. }

Whereas, at a public sale of real estate for the non-payment of taxes made in the county aforesaid on the thirteenth day of October, A. D. 1876, the following-described real estate was sold, to wit:

Lots one (1), two (2), three (3), four (4), five (5), and six (6), in block three (3), in Sutton's addition to Chicago.

Also, on the 20th day of October, A. D. 1876, the following-described real estate was sold, to wit: Lot six (6), in block two (2), in Fluorney's resubdivision of Jones and Patrick's addition to Chicago.

Also, on the thirteenth (13th) day of October, A. D. 1876, the following-described real estate was sold, to wit:

Lots twenty-seven (27) and thirty (30), of sub-block two (2), in block six (6), in Honore's subdivision of block one (1), two
31 (2), three (3), four (4), five (5), and west half of block six (6), in Tiernan's subdivision of part section eighteen (18), in township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

Also, on the fourteenth (14th) day of October, A. D. 1876, the following-described real estate was sold, to wit:

Lot thirty-nine (39), in block three (3), in Johnson's subdivision of the north half (½) of the west half of the southwest quarter of section nineteen (19), in township thirty-nine (39) north, range fourteen east, of the third principal meridian, and lot number ninety-two (92), in block one (1), in Sampson & Green's addition to Chicago, and sublot ten (10), in a resubdivision of lots three (3) to twenty-six (26), both inclusive, in block one (1), in Brainard and Evans' addition to Chicago, and sublots fourteen (14) and sixteen (16), in a resubdivision of lots five (5), six (6), and seven (7), in block fifty-four (54), and sublot eleven (11), in a subdivision of lots eleven (11), twelve (12), thirteen (13), and fourteen (14), in block fifty-six (56); all in the canal trustees' new subdivision of blocks in the northwest quarter (¼), except blocks fifty-seven (57) and fifty-eight (58) of section twenty-one (21), in township thirty-nine (39) north, of range fourteen (14) east, of the third principal meridian.

Also, on the sixteenth (16) day of October, A. D. 1876, the
32 following-described real estate was sold, to wit:

Lot three (3), in Cossit's addition to Chicago, being a subdivision of the east ten and one hundred and eighty-six one thousandths $10\frac{186}{1000}$ acres of the north half (½) of the north half (½) of

the southeast quarter (¼) of section twelve (12), in township thirty-nine (39) north, range thirteen (13) east, of the third (3rd) principal meridian, and the north twenty-five feet of the south twenty-seven (27) feet of lot two (2), in block one (1), in Cossit's second (2nd) addition to Chicago, in the southeast quarter (¼) of section twelve (12), in township thirty-nine (39) north, range thirteen (13) east, of the third (3rd) principal meridian, and lot five (5), in block four (4), in Mary Smith's subdivision of lot three (3), in the south half (½) of the southeast quarter (¼) of section twelve (12), in township thirty-nine (39) north, range thirteen (13) east, of the third (3rd) principal meridian; all situated in said Cook county and State of Illinois.

And whereas, the same not having been redeemed from said sale, it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Illinois necessary to entitle him to a deed of said real estate:

Now, therefore, know ye that I, E. F. C. Klokke, county
32½ clerk of said county of Cook, in consideration of the premises and by virtue of the statutes of the State of Illinois in such cases provided, do hereby grant and convey unto Asahel Gage, his heirs and assigns, forever the said real estate hereinbefore described, subject, however, to any redemption provided by law. The following provision of the Revised Statutes of the State of Illinois, being section 225 of chapter 120, is recited pursuant to law: Unless the holder of the certificate for real estate purchased at any tax sale under this act takes out the deed as entitled by law and files the same for record within one year from and after the time for redemption expires, the said certificate or deed and the sale on which it is based shall from and after the expiration of such one year be absolutely null.

If the holder of such certificate shall be prevented from obtaining such deed by injunction or order of any court or by the refusal of the clerk to execute the same, the time he is so prevented shall be excluded from the computation of such time.

Given under my hand and the seal of our court this sixteenth (16) day of July, 1879.

[County Court of Cook County, Illinois.. Organized 1849.]

E. F. C. KLOKKE,
County Clerk.

No. 230,153. Filed for record July 19, 1879. Jas. W. Brockway, recorder.

33 This plaintiff alleges and charges the truth to be that there was no advertisement of any public sale of real estate for the non-payment of taxes to take place on the thirteenth day of October, A. D. 1876, in said Cook county; there was no judgment or precept of any court of record of said Cook county requiring said lands to be sold on that day; there were no lawful taxes due or unpaid upon which said land could be or ought to have been sold on that day.

This plaintiff further alleges and charges that notice to redeem said lots of this plaintiff from said pretended sale was not given, as required by the constitution and statutes of Illinois, and that no such notice or evidence thereof was filed with or recorded by the county clerk of Cook county.

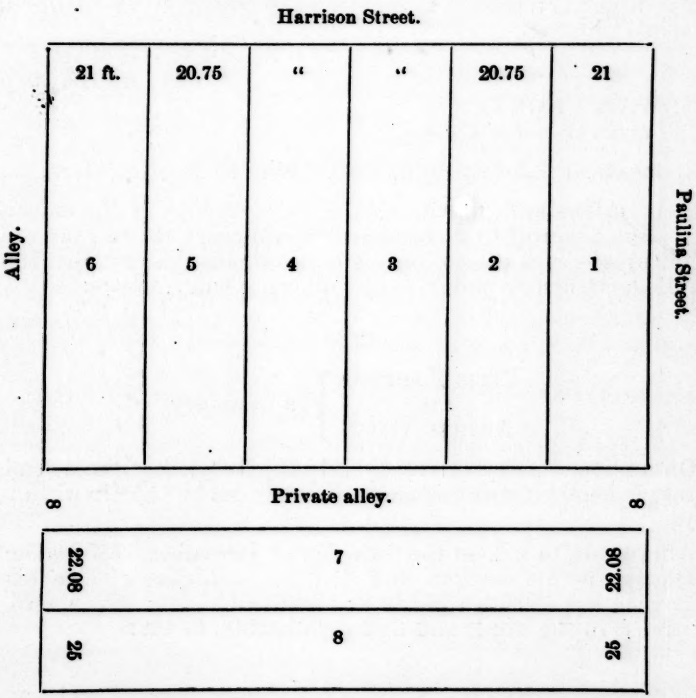
By the laws of the State of Illinois such tax deed as the foregoing cannot be read alone as evidence of title and is no evidence of the existence of judgment, precept, or affidavits of notice or certificate of sale or assignment thereof, and, except in connection with sufficient affidavits of notice and sufficient and valid judgment and precept, such tax deed is not evidence of title; and it is incumbent on any person claiming title through a tax deed to produce and read with it the judgment, precept, and affidavits on which it is predicated.

34 Further, by the laws of Illinois such judgment is not conclusive evidence of the right to selll and thereunder; but if, by anything appearing on the record or off the record or by investigation of the taxes or other amount included in such judgment, it appears that judgment included any improper or illegal sum, however small, the sale on such judgment is void and is to be set aside or a bill to remove the same, as a cloud on the title to the land; and this plaintiff shows unto the court that if said defendant would give a statement and schedule of the taxes, interests, costs, and other amounts for which the pretended sales mentioned and referred to in the above-described pretended tax deeds were made (if any such sales were, in fact, made) it will appear or can be shown that such amounts comprise divers illegal sums, and that each of said pretended sales was made (if made at all) for sums in whole or in part illegal or that had been paid and that were not liens or claims on the land; but this plaintiff does not know and cannot ascertain with certainty for what taxes, assessments, interest, costs, and amounts said defendant pretends to have purchased said lands or pretends to have entered into the pretended sales mentioned in and on which said pretended deeds depend, unless said defendant shall discover the same, but the plaintiff charges that said amounts or some of them or some part of them, respectively,

35 are and were illegal and no lien on said lands, and did not and could not authorize sale thereof; and plaintiff further shows that said lands could not lawfully be assessed by the description shown in said pretended tax deeds, but could only be assessed by the description given in the original bill in this case. The original six lots, namely, lots 1, 2, 3, 4, 5, 6, in block 3, Sutton's addition to Chicago, fronted east on Paulina street, and the same were by plat duly acknowledged October 4, A. D. 1871, approved by the board of public works of Chicago October 4th, A. D. 1871, and recorded in said Cook county October 6th, 1871, subdivided as follows:

(Here follows diagram marked page 36.)

GAGE
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KAUFMAN. } No. 189. P. 36.



And said lots in said new subdivision were conveyed to divers persons to whom they were assessed severally from said year 1871 until said year 1876.

To the end, therefore, that the said defendant may full, true' direct, and perfect answers make to all and singular the matters aforesaid, and that as fully and particularly as if the same
37 were here again repeated and he distinctly interrogated thereto, and that he may set forth and show all papers, matters, and documents on which his said claims to title to said land are founded, and may give a particular schedule and statement of the amount of taxes, assessments, interests, penalties, costs, and other sums, if any, giving the year or years for which the same and each of them are claimed, for which he claims and pretends that said pretended sales were made, together with the time when each item was assessed according to his claim and by whom the same was assessed or charged or pretended so to be, and that he may set forth all matters and things on which he founds his said pretended claims, and that the title of the plaintiff to said premises first-above de-

scribed may be quieted and the said clouds removed therefrom, and that he may have such other or further or different relief in the premises as equity may require:

May it please the court to require said defendant to answer this amended bill, &c.

ELLIS KAUFMAN,
By His Att'y.

EDWARD ROBY,
Solicitor and of Counsel.

Endorsed: Filed July 10th, 1885. Wm. H. Bradley, clerk.

38 Afterwards, to wit, on the thirtieth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ELLIS KAUFMAN
vs.
ASAHEL GAGE. } In Chancery.

On motion of complainant, by Edward Roby, Esq., the defendant herein is hereby ruled to answer the amended bill herein within ten days.

Afterwards, to wit, on the fifth day of December, 1885, came the defendant, by his solicitor, and filed in said clerk's office his demurrer to the amended bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA,
State of Illinois, Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of the State of Illinois.

ELLIS KAUFMAN, Complainant,
vs.
ASAHEL GAGE, Defendant. } In Chancery.

39 The demurrer of Asahel Gage, the defendant, to the amended bill of complaint of Ellis Kaufman, the above-named complainant.

This defendant, by protestation, not confessing or acknowledging any of the matters or things in the said complainant's amended bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur to said amended bill of complaint, and for cause of demurrer this defendant saith that it does not appear in and by the said amended bill of complaint who is in the possession of the property therein

described, neither does it appear that this defendant is not in possession thereof, neither does it appear that the said complainant hath not an adequate remedy at the common law.

And for further cause of demurrer this defendant saith that the said complainant in and by his said amended bill of complaint, while seeking the aid of this court of equity to relieve him from tax titles acquired and owned by the defendant, for the purchase of which the defendant has paid out divers sums of money, as appears by the said amended bill of complaint, doth not offer to do equity towards the defendant in this behalf and doth not offer to repay the taxes so shown by said amended bill of complaint to have been paid by this defendant.

And for a further cause of demurrer this defendant saith
40 that the said complainant in and by his said amended bill of complaint asks and prays for a discovery from this defendant, and this defendant saith and doth and will insist that the matters of discovery sought by said amended bill of complaint are all matters of public record and within the reach of the said complainant.

And this defendant saith that the said amended bill of complaint of the said complainant is not under oath.

And for a further cause of demurrer this defendant saith that the said complainant in and by his said amended bill of complaint hath alleged and stated by way of conclusion, argument, or upon information and belief certain grounds or reasons why the title of this defendant should be set aside, and that the said complainant hath also set out in said amended bill of complaint in *hæc verba* the tax deeds under which this defendant claims title, and this defendant saith and doth and will insist that said tax deeds and each of them are *prima facie* evidence sufficient in itself to rebut and overcome all of said allegations in said amended bill of complaint.

And for a further cause of demurrer to said amended bill of complaint this defendant saith and doth and will insist that the said complainant hath not in and by his said amended bill of complaint made or stated any case or grounds for relief sufficient to
41 entitle him in a court of equity to any discovery of or relief against this defendant as to the matters and things set forth and alleged in said amended bill of complaint, or any or either of said matters and things; wherefore, and for divers other good and sufficient cause of demurrer appearing upon said amended bill of complaint, this defendant doth demur thereto and humbly demands judgment of this honorable court whether he shall be compelled to make other or further answer to said amended bill of complaint.

ASAHEL GAGE,
By AUGUSTUS N. GAGE,
His Solicitor and Att'y-in-Fact in this Regard.

AUGUSTUS N. GAGE, *Of Counsel.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Augustus N. Gage, being first duly sworn according to law, says that he is the attorney-in-fact for Asahel Gage, and that he has read the foregoing demurrer by him subscribed for the said Asahel Gage, and knows the contents thereof, and that the said demurrer is not interposed for delay.

AUGUSTUS N. GAGE.

Subscribed and sworn to before me this 5th day of December, A. D. 1885.

[SEAL.] FRANKLIN HATHEWAY,
Notary Public.

42 I hereby certify that, in my opinion, the foregoing demurrer of the defendant, Asahel Gage, to the amended bill of complaint of the above-named complainant is well founded in point of law.

AUGUSTUS N. GAGE,
Of Counsel.

Endorsed: Filed Dec. 5, 1885. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-second day of March, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

ELLIS KAUFMAN
vs. } In Chancery.
ASAHEL GAGE.

Now come the parties, by their solicitors, and now comes on to be heard the defendant's demurrer to the bill herein, and after hearing the arguments of counsel the court overrules said demurrer, and, on motion, leave is given said defendant to plead or answer within twenty days and to set up in said plea or answer the same defense contained in said demurrer.

43 Afterwards, to wit, on the twenty-sixth day of March, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

ELLIS KAUFMAN
vs. } In Chancery.
ASAHEL GAGE.

Now again come the parties to this cause, by their respective solicitors, and the defendant elects to stand by his demurrer, and

that he will not make other answer to the amended bill of complaint of the said plaintiff, which is ordered by the court to be entered of record and the said bill taken for confessed by the said defendant; and thereupon this cause coming on to be heard upon the original bill and the demurrer and plea of the defendant thereunto pleaded, and the said amended bill taken for confessed as aforesaid upon the overruling of the demurrer of the defendant thereto and his election to stand by said demurrer and to make no other or further answer to said amended bill, and the court, having heard the arguments of the counsel for the respective parties and duly considered the matter, doth find the equities to be with the plaintiff, and that he ought to have relief, and that his title ought to be quieted and the clouds removed therefrom, as prayed in said bill and amended bill.

44 Therefore it is ordered, determined, adjudged, and decreed by the court that he, the said plaintiff, Ellis Kaufman, is seized in fee simple of lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8) and of the private alley north of said lot seven (7) of McKay's subdivision of lots one (1) to six (6), inclusive, in block three (3) of Sutton's addition to Chicago, being part of northeast quarter of southeast quarter of section eighteen (18), in township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian, situate in the county of Cook and State of Illinois, in the northern district of Illinois; that the defendant, Asahel Gage, pretends and claims pretended — to said lands, claiming that he is owner of said lands and premises in fee under and through two certain tax deeds, namely, one tax deed executed, acknowledged, and delivered to said defendant, Asahel Gage, by Herman Lieb, the then county clerk of Cook county, Illinois, on the twenty-ninth day of April, A. D. 1876, and recorded in the office of the recorder of deeds of said county on the tenth day of July, A. D. 1876, in Book 658 of Records at page 303, and the other of said pretended tax deeds executed, acknowledged, and delivered to said defendant—to Asahel Gage—by E. F. C. Klokke, the then county clerk of Cook county, Illinois, on the sixteenth day of July, A. D. 1879, and recorded in the office of said recorder of deeds of said county on the nineteenth day of July, A. D. 1879, in Book 869 of Records at page 608; that the said tax deeds and each of them are null and

45 void, and that the same and all claims and pretences of the said defendant, Asahel Gage, of title to said land ought to be set aside, declared null and void, and removed as clouds upon the title of said plaintiff to said lands.

And it is hereby decreed that the fee-simple title of said plaintiff in and to the said premises whereof he is seized as aforesaid be, and the same is hereby, quieted and set at rest in him, said plaintiff, and the claims of the said defendant, Asahel Gage, of title of said lands, and especially the two tax deeds above described, are declared and decreed to be without foundation and wholly null and void, and that the cloud of all said claims, and especially of said tax deeds, be, and the same is hereby, removed from the said title of said plaintiff in and to the premises aforesaid, and that said plaintiff shall from

henceforth enjoy his said title to said lands and each and every part thereof free and clear of and from all claims of the said defendant, Asahel Gage, and especially of and from said tax deeds and each of them.

And it is further ordered that the said plaintiff do recover of the said defendant his costs in this suit to be taxed, and that he have execution therefor.

And thereupon, upon agreement of parties hereto and evidence thereof taken, the court doth find the value of said land and real estate is of the value of ten thousand dollars ($10,000).

And thereupon the said defendant, Asahel Gage, prays an appeal to the Supreme Court of the United States, which is allowed
46 to him, upon his filing bond herein in the penal sum of one thousand dollars, with Henry H. Gage as surety, conditioned according to law, within sixty days from this date.

47 Afterwards, to wit, on the thirtieth day of April, 1886, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Asahel Gage and Henry H. Gage, are held and firmly bound unto Ellis Kaufman in the full and just sum of one thousand ($1,000.00) dollars, to be paid to the said Ellis Kaufman, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a term of the circuit court of the United States for the northern district of the State of Illinois, in a suit depending in said court between Ellis Kaufman, the complainant, and Asahel Gage, the defendant, a decree was rendered against the said Asahel Gage, and the said Asahel Gage having obtained an appeal to reverse the said decree in the aforesaid suit and a citation directed to the said Ellis Kaufman citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

48 Now, the condition of the above obligation is such that if the said Asahel Gage shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ASAHEL GAGE, [SEAL.]
By AUGUSTUS N. GAGE, [SEAL.]
His Att'y-in-Fact.
HENRY H. GAGE. [SEAL.]

Approved by—
H. W. BLODGETT, *Judge.*

Endorsed: Filed April 30, 1886. Wm. H. Bradley, clerk.

49 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Ellis Kaufman is the plaintiff and Asahel Gage is the defendant as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this sixth day of May, 1886.

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 189. Asahel Gage, appellant, *vs.* Ellis Kaufman. Filed October 15, 1886.

Office Supreme Court U. S.
FILED.
NOV. 25 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

ASAHEL GAGE, *Appellant,*
vs.
ELLIS KAUFMAN.

No. 189.

Brief for Appellant.

AUGUSTUS N. GAGE,
Counsel for Appellant.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 87 CLARK STREET.
1889.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 189. OCTOBER TERM, A. D. 1889.

ASAHEL GAGE, *Appellant,*

vs.

ELLIS KAUFMAN,

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is a bill in equity, originally filed in the Superior Court of Cook County, Illinois, by Ellis Kaufman against appellant, to remove a cloud from the title of several lots in Chicago in said bill mentioned. To this bill Asahel Gage appeared and filed his petition and bond and caused the case to be removed into the Circuit Court of the United States for the Northern District of Illinois; thereupon appellant filed a plea to the bill, which plea, upon argument, was adjudged to be sufficient, and leave was given Kaufman to amend his bill, which amended bill was filed on July 10, 1885, and is found at page 11 of the transcript. By the amended bill it is alleged that said Kaufman is seized in fee simple of the lots therein described, and that appellant claims title thereto under two tax deeds therein enumerated, and thereupon, at page 12 of the transcript, the first of these tax deeds is set out in full, and then follow

words to charge its irregularity; and at page 14 of the transcript the second tax deed is set out in full, and thereupon follow words to charge its irregularity, which charges are substantially as follows:

The plaintiff charges and alleges the truth to be that there was no advertisement of any public sale of real estate for the non-payment of taxes, to take place on the 13th day of October, 1876 (the day of the sale of the property in controversy), in said Cook county; that there was no judgment or precept of any court of record requiring a sale on that day; and that there were no lawful taxes due upon which said land could have been sold on that day.

This plaintiff further alleges and charges that notice to redeem said lots from said sale was not given as required by the Constitution and statutes of Illinois, and that no such notice, or evidence thereof, was filed with the county clerk of Cook county. Then it is charged that such tax deed can not be read as evidence, under the laws of Illinois, without evidence of the existence of a judgment, precept, etc., and except in connection with a valid judgment, precept, etc., said deed is not evidence of title, and that it is incumbent upon the person claiming through such deed to produce and read the judgment, precept, etc.; that by the laws of the State of Illinois such judgment is not conclusive evidence of the right to sell, but if, by anything appearing on or off the record, it appears that the judgment was illegal, such sale is void, and is to be removed as a cloud upon the title of land, and this plaintiff shows that if the defendant would give a statement and schedule of the taxes, interests, etc., for which the property was sold and the deed made, it can be shown that such amounts contain illegal items; but this plaintiff does not know, and can not ascertain with certainty, for what taxes, etc., the defendant pretends to have purchased said lands, or pretends to have entered into the said sales, unless the defendant shall discover the same; but plaintiff charges that some of them, or some part of them, were illegal, and did not authorize the sale; and plaintiff further

shows that said land could not lawfully be assessed by the description shown in said deed, but could only be assessed by the description given in the bill; that the original lots 1 to 6, block 3, Sutton's addition to Chicago, fronted east on Paulina street, and were, by plat acknowledged and recorded in 1871, subdivided as follows: (see transcript page 17) Then follows prayer for an answer to said bill, and for a discovery, as follows: that the defendant set forth all papers, matters and documents on which his title was founded, and give a particular schedule and statement of taxes, assessments, interests, penalties and costs, and other sums, if any, giving the year or years for which the same and each of them are claimed, for which he claims the sales were made, together with the time when each item was assessed, and by whom assessed, and that he may set forth the things on which he founds his claim; and further prays that the title of the plaintiff in the premises be quieted, and the clouds removed therefrom and for general relief. And afterward appellant filed a special and general demurrer to this bill, which was duly certified by counsel. The demurrer appears at page 18 of the transcript. The special point of demur pointed out in the demurrer, was that it did not appear by the bill that the property was vacant and unoccupied, that it did not appear that Kaufman was in the possession of the property, neither did it appear that appellant was not in possession thereof, neither did it appear that Kaufman did not have an adequate remedy at the common law; and a further special ground of demur was that the said Kaufman sought by his bill the aid of a court of equity to relieve him from tax titles owned by appellant, for which it appears from the bill appellant had paid out large sums of money, and yet said Kaufman did not offer to do equity in this behalf, and to repay the taxes shown by the bill to have been paid by appellant; and a further special ground of demur was that in his bill said Kaufman prayed for a discovery from appellant of matters which are all of public record within the reach of the complainant, and that the said bill is not under oath; and for a further cause of demur it was shown that in his

bill Kaufman stated by way of conclusion, argument, or upon information and belief, certain reasons why appellant's title should be set aside, and at the same time said Kaufman set out in his bill *in haec verba*, the tax deeds under which appellant claims; and that each of these deeds is *prima facie* evidence sufficient in itself to rebut and overcome all of said allegations, and concludes as a general demurrer.

Upon the argument of this demurrer it was overruled by the court, and thereupon the plaintiff presented his decree, which was entered in the Circuit Court on the 26th day of March, 1886, which decree grants to said Kaufman, the complainant below, the relief prayed in and by his said bill, setting aside the tax deeds mentioned in said bill, declaring the same to be null and void, and that the said Kaufman should enjoy said land free and clear of all claims of appellant; and it was further ordered and decreed that the plaintiff recover of appellant his costs, to be taxed and have execution therefor, whereupon appellant prayed and perfected an appeal to this court.

Assignment of Errors.

And now comes the said Asahel Gage, by Augustus N. Gage, his counsel, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court below erred in overruling appellant's demurrer in substance, manner and form as aforesaid.

Second. The court below erred in entering a decree in favor of Ellis Kaufman in substance, manner and form as aforesaid.

Third. The court below erred in entertaining the bill of complaint when it did not appear but that the complainant had an adequate remedy at the common law in substance, manner and form as aforesaid.

Fourth. The court below erred in decreeing relief without requiring the complainant to repay to appellant the taxes by him extinguished.

Fifth. The court below erred in not dismissing said bill of complaint for want of equity.

Sixth. The court below erred in its conclusions of law.

And the said Asahel Gage, appellant, prays that the order and decree aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he has lost by occasion of the order and decree aforesaid.

Augustus N. Gage,
Counsel for Appellant.

ARGUMENT.

I.

The Bill of Complaint Does Not Show a Jurisdictional Case.

It will be observed upon reference to this case that nowhere in the bill is there any allegation which can imply that the complainant does not possess an adequate remedy at the common law. This is, in fact, one of the special demurrers pointed out in the court below. It has been customary in all well drawn bills from time immemorial, in order to show that a court of equity could entertain jurisdiction over the case, for the pleader to allege that he applied to a court of equity for relief because he had no adequate remedy by the strict rules of the common law. After making such an allegation and thus stating a *prima facie* case upon which the court may exercise its jurisdiction, it is not infrequent that the question whether the complainant has an adequate remedy at the law is presented by demurrer for the adjudication of the court; but where the bill is entirely silent upon this jurisdictional feature, the court should not proceed to decree, when the defendant insists by demurrer upon his common law right.

In the case at bar there is no allegation in the bill that charges or tends to show that the complainant does not have an adequate remedy at the common law; then upon elementary principles it necessarily follows that a special demurrer pointing out this defect in the bill should have been sustained, and the bill dismissed for want of equity, unless the complainant could show that his remedy at law was insufficient.

The bill in this case is filed under the provisions of a statute of the State of Illinois, which is as follows: "The court may hear and determine bills to quiet title, and to remove clouds from the title to real estate, whether the lands

in controversy are improved or occupied, or unimproved or unoccupied." * * *

Sec. 50, Chap. 22, Revised Statutes of Illinois, 1874.

This act has received repeated construction from the Supreme Court of the State of Illinois, and it has been uniformly held that in all such bills it must appear that the complainant is either in possession of the property, or that the property is vacant and unoccupied.

Hamilton v. *Quimby*, 46 Ill. 90.
Comstock v. *Henneberry*, 66 Ill. 212.
Harding v. *Jones*, 86 Ill. 313.
Gage v. *Abbott*, 99 Ill. 366.
Gage v. *Griffin*, 103 Ill. 41.

In the two cases last cited, the record was presented to the Supreme Court of Illinois, the same as here, upon a demurrer to a bill which did not allege that the complainant was in possession of the property, or that the land was vacant and unoccupied.

II.

THE BILL IN THIS CASE DOES NOT OFFER TO REPAY, AND THE DECREE DOES NOT REQUIRE THE REPAYMENT OF THE TAXES PAID BY APPELLANT, AND WHICH HAVE INURED TO THE BENEFIT OF APPELLEE.

Had the complainant in the bill stated such a cause as to show to the court that he had a right in equity to litigate purely legal titles, and shown to the court that his remedy in ejectment was not sufficient for his relief, yet his bill herein should not be entertained in equity until he had offered to do equity.

The gist of the bill is to remove, as clouds upon the complainant's title, certain tax deeds issued in consequence of the failure of the appellee to pay his portion of the public burdens when they became due and payable, and in such case it is not equitable or just that this relief should be granted, except upon the condition that those dues and charges should be repaid to him who has advanced them.

It is not just and equitable that one may neglect to pay his share of the public expense and remain idly by until another has discharged his obligation to the State, and then, after many years of laches, receive relief from the title created by such payment, without repaying to the person who discharged the obligation at least the amount which he expended in that behalf. This proposition is also elementary, and the following authorities are cited as showing the determination upon this question by the Supreme Court of Illinois:

Farwell v. *Harding*, 96 Ill. 32.
Smith v. *Hutchinson*, 108 Ill. 662.
Gage v. *Nichols*, 112 Ill. 269.

This is based upon the principle that he who seeks equity must do equity.

It clearly follows that the demurrer should have been sustained to the bill, because the bill did not offer to repay those taxes which had been paid by appellant, and it was as clearly erroneous for the court to grant relief without attaching such a condition thereto; for, conceding for the argument that the offer in the bill to do equity in the premises might, under certain circumstances, be dispensed with, still the court ought not to be the instrument in aid of an inequitable act.

III.

The Bill is Insufficient as a Bill of Discovery.

As a bill of discovery the one under consideration is materially defective; the only discovery sought, as will appear from reference to the bill, is of matters wholly and purely of record. These matters are as much within the knowledge of the complainant as of the defendant; therefore they are not a proper subject of discovery. They relate entirely to the tax deeds under consideration, which are matters of public record.

Hyde v. *Heath*, 75 Ill. 381.
Gage v. *Reid*, 104 Ill. 509.

Again to show that he is entitled to the discovery of such matters as refer entirely to the defendant's case, the complainant must annex to his bill an affidavit stating that he does not know what they are, and has no means of obtaining them.

1 Dan'l Ch. Pl. 392.
Story Eq. Pl. §§ 288, 289.

This is not done in the case at bar, and the bill before us is not under oath.

It would also have to appear before such discovery could be demanded, that there was a privity between the parties; "for it is a rule of the court that where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims."

1 Dan'l Ch. Pl. 579.
Story Eq. Pl. §§ 571–572, 858.

It therefore appears that the demurrer should have been sustained, and the bill dismissed for want of equity.

There are still other and more important reasons why this bill should be dismissed; they go to the foundation of the action, the very charges and allegations whereby it is sought to defeat appellant's title, and they may be discussed under the following heading:

IV.

The Bill Does Not State Any Ground of Relief against Appellant's Title.

The bill sets out *in hæc verba* the tax deeds claimed by appellant. The court's attention will be called to the second of those tax deeds only. By the bill it is alleged and set out that appellant obtained a tax deed dated July 16, 1879, and recorded July 19, 1879, which deed recites that at a public sale of real estate for the non-payment of taxes made in the county aforesaid, on the 13th day of October, 1876, the following described real estate was sold, to wit: lots 1,

2, 3, 4, 5 and 6, in block 3, in Sutton's addition to Chicago; and the deed recites that the property had not been redeemed from the sale; that the legal holder of the certificate had complied with the law to entitle him to a deed of the real estate, therefore the county clerk, in consideration of the premises, and by virtue of the statute, granted and conveyed unto appellant, his heirs and assigns forever, the real estate above described, subject to any redemption provided by law; then was quoted, as required by the statute, Section 225 of Chapter 120 of the Revised Statutes; the deed is executed under the hand and seal of said county clerk on the day aforesaid. This deed was made by statute *prima facie* evidence of certain facts as will be found by reference to Section 224, Chapter 120, of the Revised Statutes of Illinois of 1874, which reads as follows:

"Deeds executed by the county clerk as aforesaid, shall be *prima facie* evidence, in all controversies and suits in relation to the right of the purchaser, his heirs or assigns, to the real estate thereby conveyed, of the following facts:

First. That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law.

Second. That the taxes or special assessments were not paid at any time before the sale.

Third. That the real estate conveyed had not been redeemed from the sale at the date of the deed.

Fourth. That the real estate was advertised for sale in the manner and for the length of time required by law.

Fifth. That the real estate was sold for taxes or special assessments, as stated in the deed.

Sixth. That the grantee in the deed was the purchaser or assignee of the purchaser.

Seventh. That the sale was conducted in the manner required by law."

The bill makes an attack upon this deed, and the ground may be stated as:

First. That there was no advertisement for the sale of

real estate on the 13th day of October, 1876, and no judgment or precept ordering the sale on that date. The reply to this is that there was no law requiring it.

Second. There were no lawful taxes due upon which said land could have been sold on that date. The reply to this is, that this allegation refers to and is controlled by a subsequent one, in which it is said that the property was improperly assessed, and will be discussed when we reach that allegation. And to another allegation in which it is alleged the complainant does not know, and without a discovery of the defendant he can not find out, whether any of the taxes are irregular.

Third. The plaintiff alleges and charges that the notice to redeem from said sale was not given as required by the Constitution and statutes of Illinois. The reply is that the allegation is purely argumentative, and fails to apprise the defendant of the defect, if any, which it is claimed exists in the notice.

Fourth. Certain recitals of the pleader's understanding of the law of evidence in the State of Illinois. The answer to this is that it is argumentative, and does not show any ground for relief, but merely states the pleader's conclusion as to the inability of the defendant to prove his case.

Fifth. The plaintiff charges that some portion of the taxes were illegal and did not authorize the sale; that the lands could not lawfully be assessed by the description shown in the deed, but could only be assessed by the description contained in his bill; and he therein attaches an alleged plat of the property, showing his lots to be six facing upon Harrison street, and two facing upon Paulina street, and he alleges that the lots described in the deed faced upon Harrison street, and that his lots were a subdivision thereof. The answer to this allegation is that any description of property for the purpose of taxation or for conveyance, by which the property can be located by a surveyor, is sufficient, and that in this bill it appears that the two pieces of property are iden-

tical and the same. and therefore there is no irregularity in the assessment thus made.

The answer to all of these propositions is, that it was stated in the demurrer, as a special ground of defense to the bill, that the statutes of Illinois made the tax deed set out *in hæc verba* in the bill *prima facie* evidence sufficient to rebut each of the allegations against it, and if the court will again turn to the quotation from the statute above set out, it will find there enumerated the several matters of which the tax deed is *prima facie* evidence, and that those items cover each of the objections that are contained in the bill of complaint; that the bill of complaint is not sufficiently worded to overcome that presumption; it has not stated a single fact as a fact, so as to lay the foundation for the introduction of proof to overcome the *prima facie* case made by the deed. The court will observe that there is no attack upon the judgment under which the deed was issued, and the judgment is subsequent to each of the proceedings attacked by the bill, excepting the service of notice. Now the judgment remaining unassailed, constitutes a bar to any collateral objection in relation to the assessment of the property. It is true that the bill states that there was no judgment ordering the sale on the 13th day of October, 1876, but, as already stated, there was no law requiring such a judgment. It is unnecessary for this argument to go into a review of the revenue law of Illinois to show all of the details thereof, leading up to and including the judgment, but it is sufficient to say that the law provides for a judgment to be entered for a sale to commence on a specific day, and that such sale is to be continued from day to day until all the property is sold; and the presumption of the deed is, "*Seventh*, that the sale was conducted in the manner required by law."

Again, the bill has not laid the foundation for a collateral attack upon the judgment, as it is the settled law in Illinois that no collateral attack can be made upon the validity of a judgment in tax proceedings where the owner of the land appeared in the County Court and resisted the entry of the

judgment at the time the judgment was applied for, and that the only case in which such a judgment can be attacked collaterally is when the judgment is entered by default.

Graceland Cemetery Co. v. *People*, 92 Ill. 619.

And the bill in this case does not show that the parties are in a position to attack the validity of this judgment.

There is only one point left in this bill, so far as it relates to the tax deed under consideration, upon which any relief could be predicated. That point is found at the top of page 16 of the transcript, and it reads as follows: "This plaintiff further alleges and charges that notice to redeem said lots of this plaintiff from said pretended sale was not given as required by the Constitution and statutes of Illinois, and that no such notice or evidence thereof was filed with or recorded by the county clerk of Cook county."

This allegation is purely argumentative. It concedes the service of the notice, but it charges that the notice is not such a notice "as required by the Constitution and statutes of Illinois." This is not an allegation that can be answered by a defendant; it does not apprise him of any defect which it may be claimed exists in the record of his title. It merely states that the record of his title is, in the pleader's conclusion or opinion, not such a record as the Constitution and the laws require. This does not present an issue of fact to be determined, but a conclusion of law; and it is not such a matter as would entitle a complainant to relief from an adverse title.

From what has been said it must clearly appear:

First. That the bill does not allege but that the complainant had an adequate remedy at the common law.

Second. That it does not appear from the bill that the property is vacant and unoccupied, or that the complainant is in possession, or that appellant is not in possession thereof.

Third. That the bill does not offer to do equity, and that the decree does not require the complainant to repay to appellant the taxes which he extinguished by his purchase,

and which by the decree has inured to the benefit of the appellee.

Fourth. Although the matters aforesaid are fatal to the bill, yet, upon the merits of the controversy as stated in the bill, the complainant has not made a case which would entitle him to any relief from the deed set out in his bill and dated July 16, 1879.

Because of the matters aforesaid the decree ought to be reversed and an order entered herein dismissing the bill for want of equity, or providing for such further proceedings as may seem proper to the court.

Respectfully submitted,

AUGUSTUS N. GAGE,
Counsel for Appellant.

FILED.
DEC 19 1889
JAMES H. McKENNEY.
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 189.

ASAHEL GAGE, Appellant,

vs.

ELLIS KAUFMAN, Appellee.

BRIEF FOR APPELLEE.

EDWARD ROBY,
COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1889.

No. 189.

ASAHEL GAGE, Appellant,

vs.

ELLIS KAUFMAN, Appellee.

BRIEF FOR APPELLEE.

Appellee exhibited his bill in the Superior Court of Cook County, State of Illinois (shown on page 2 of transcript), against Asahel Gage, alleging that he (plaintiff below) is seized in fee simple of lots 1, 2, 3, 4, 5, 6, 7, 8, and of the private alley north of said lot 7, of McKay's subdivision of lots 1 to 6, inclusive, in block 3, Sutton's Addition to Chicago, situate in said county; "that the defendant" (appellant here) "pretends and claims pretended title to said lands, the precise nature of which is to this plaintiff unknown, but which defendant pretends to comprise some sort of proceedings, judgments, notice, and deeds by some person or persons *out of possession*, conveying said premises or some lien thereon to said defendant, *the further particulars of which*, and the exact extent of said defendant's claims *this plaintiff cannot state*; but the plaintiff shows that by said pretenses and claims of said defendant the title of said plaintiff is so unsettled and clouded that he is unable to sell said land for its value, or to enjoy and possess the same free and clear from clouds and incumbrances, as he has the right to do."

(The above, stating part, was sufficient. *Morgan* v. *Smith*, 11 Ill., 200, 201; *Wescott* v. *Weeks*, 72 Ill., 524;

Cooper's Equity Pleadings, 6; *Henry Co.* v. *Winnebago Drain Co.*, 52 Ill., 302; Story's Equity Pleading, § 255; *Finch* v. *Martin*, 19 Ill., 105, p. 112; *Reynolds* v. *Crawfordsville Bank*, 112 U. S., 410, 411.)

Following a practice sanctioned by the usage of Illinois and similar to that prescribed by the 21st Rule of Practice in Equity in the Courts of the United States, the plaintiff in this bill omitted "the confederacy clause" "the charging part," and "the jurisdiction clause," and proceeded at once to the prayer for discovery and relief, which was:

"To the end, therefore, that the said defendant may "full, true, direct and perfect answer make to all and "singular the matters aforesaid; and" (*prayer for discovery*) "may set forth and state each and every particu- "lar of his said claims and of all papers, documents and "matters on which the same are founded; and" (*prayer for relief*) "that the title of this plaintiff to said premises "may be quieted, and that he may have such other or "further or different relief in the premises as equity "may require, may it please the court to summon said "defendant to answer," etc.

REVISED STATUTES of Illinois, Ch. 22, *entitled* Chancery, contains the following:

§ 1. The several Circuit Courts of this state, and Superior Court of Cook County, *in all cases* in which they may have jurisdiction *as courts of chancery*, shall have power to proceed therein according to the mode hereinafter prescribed; and, where no provision is made by this act, according to the general usage of courts of equity. (*This is very like U. S. Equity rule 90.*)

§ 4. The mode of commencing suits in chancery shall be by filing a bill of complaint with the clerk of the proper court, setting forth the nature of the complaint.

§ 8. Upon the filing of every bill, the clerk of the court shall thereupon issue a summons, etc. (Like U. S. Equity Rules 11, 12.)

§ 20. When a bill * shall be filed in a court of chancery, other than for discovery only, the complainant may waive the necessity of the answer being made on the oath of the defendant, defendants or any of them; and in such case, the answer may be made without oath, and shall have no other or greater force as evidence than the bill.

§ 22. Every answer shall be verified by an oath or affirmation, except as provided in the foregoing section.

§ 23. Every defendant shall answer fully all the allegations and interrogatories of the complainant, whether an answer on oath is waived or not, except such as are not required to be answered, by reason of exceptions, plea or demurrer thereto allowed.

§ 25. When the complainant shall require a discovery respecting the matters charged in the bill, the disclosure shall not be deemed conclusive, but, if a replication be filed, may be disproved or contradicted,

like any other testimony, according to the practice of courts of equity.

§ 40. The court may, in its discretion, direct an issue or issues to be tried by a jury, whenever it shall be judged necessary in any cause in equity, pending therein. In all other causes in equity, the mode of trial shall be the same as has been heretofore practiced in courts of chancery.

§ 50. The court may hear and determine bills to quiet title, and to remove clouds from the title to real estate whether the lands in controversy are improved or occupied, or unimproved or unoccupied; and the taking possession of such lands, after the commencement of suit by the party claiming the title or adverse title, or any one under or through such person or persons, shall not in anywise affect the complainant's right to a final decree upon the bill.

Chapter 28, *entitled* COMMON LAW, is as follows:

§ 1. The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

It is apparent that chancery practice and jurisdiction is the same in Illinois as in the courts of the United States. And that the 50th section does not depart from the jurisdiction exercised by United States courts of chancery is shown by reference to *Alexander* v. *Pendleton*, 8 Cranch, 462, and subsequent cases. It is possible that the Constitution of Illinois *gives a privilege* of trial by jury, as in common law cases, in some cases brought under Sec. 50, which would be inconsistent with the course, of proceeding, in cases in Equity in courts of the United States prescribed by the Constitution and laws of the United States. (See *Gage* v. *Ewing*, 107 Ill., p. 15.) We say "it is possible," because if, in the case cited, the court had considered that bills to quiet title and remove clouds from title were sanctioned by Illinois decisions as according to the approved practice and jurisdiction in chancery from time immemorial, we believe it would not have registered the *obiter* comments made on page 15 of the Report.

This practice and jurisdiction to remove clouds from titles was fully settled and established in *Gage* v. *Rohrback*, 56 Ill., 266-7; *Gage* v. *Billings*, 56 Ill., 268;

Reed v. *Tyler*, 56 Ill., 288, pp. 290–2; *Barnett* v. *Cline*, 60 Ill., 205; *Reed* v. *Reber*, 62 Ill., 240; *Lee* v. *Ruggles*, 62 Ill., 427; *Pettit* v. *Shepard*, 5 Paige Ch., 501; *Ward* v. *Dewey*, 16 N. Y., pp. 525–532; *Barnard* v. *Hoyt*, 63 Ill., 341; *Brooks* v. *Kearns*, 86 Ill., p. 550.

This reference to the law of the State under which the suit was begun, seems necessary to a *certain* understanding of the proceeding in the state court. The bill found on page 2 is a very short one. Without a *superfluous* word, it was sufficient, under the state law and under the general chancery practice (as shown above), for *discovery* and for relief. (See also *Gage* v. *Reid*, 104 Ill., p. 513.) Under the general law of chancery practice, it would be necessary to amend the bill before relief could be granted, if by his answer the defendant should discover an apparently—or *prima facie* good title. (*Gage* v. *Reid*, 104 Ill., p. 513.)

At this stage, on petition of defendant, the case was removed into the Circuit Court of the United States for the Northern District of Illinois.

To the bill appellant demurred (transcript, pp. 7–8), stating two special grounds, viz:

(1) That it does not by the bill appear that the complainant is in possession of the said lands, or that said lands are vacant and unoccupied, or that they are not in the possession of the defendant.

(2) That the bill does not show that the complainant has not an adequate remedy at the common law by action of ejectment.

General demurrer to the discovery and to the relief was appended.

Accompanying this demurrer was an answer (in form of a plea), which disclosed that defendant claimed title under two tax deeds, as follows:

"This defendant says that he is the owner of said lands "and premises in fee, claiming title thereto under and "through two certain tax deeds" (which are described by the name of the officers executing them, their dates, and dates and places of record, respectively): "And this "defendant claims and doth and will insist that the said

" complainant is not entitled *in a court of equity to any re-*
" *lief against said tax deeds, except for good cause shown,*
" *for irregularities or invalidities therein existing, by the*
" *said bill of complaint alleged to exist.* And this defend-
" ant says and doth and will insist that the said tax deeds
" are matters of record, and are well known to the said
" complainant; yet the said complainant hath not in and
" by his said bill stated any defects or irregularities therein
" or in either of the said deeds, and has not made a case
" by his bill that will authorize a court of Equity to set
" aside or in any manner interfere with the said tax deeds."
(Transcript, 9–10.)

The case coming on to be heard at this stage before Judge Blodgett, the court *overruled said demurrer* and adjudged said plea to be sufficient. And thereupon leave was given said complainant to amend his bill. (Transcript, p. 11.)

It is here necessary to refer to the Statutes of Illinois to understand the amended bill.

1st. By Chapter 30, Illinois R. S., Sections 29, 30, and 31, it is provided that, on being recorded, deeds " shall take effect as to all *creditors* and *subsequent purchasers*, without notice," and the record " shall be notice to subsequent purchasers and creditors." *Notice to any one else must be given in some other way.*

At the time of the tax deeds copied in the bill, and the sales therein recited, the statute in force was as follows:

Revised Statutes of Illinois of 1874, Chapter 120. *Entitled* REVENUE. (In force July 1, 1872).

§ 177. DELINQUENT DEFINED. All real estate upon which taxes remain due and unpaid on the tenth day of March, annually, or at the time the town or district collector makes return of his books to the county collector, shall be deemed delinquent.

§ 182. ADVERTISEMENT. At any time after the first day of April, next after such delinquent taxes and special assessments on lands and lots shall become due, the collector shall publish an advertisement, giving notice of the intended application for judgment for sale of such delinquent lands and lots, in a newspaper published in his county. * * Said advertisement shall be once published, at least three weeks previous to the term of the county court at which judgment is prayed, and shall contain a list of the delinquent lands and lots upon which the taxes or special assessments remain due and unpaid, the names of the owners, if known, the total amount due thereon, and the year or years

for which the same are due. Said collector shall give notice that he will apply to the county court at the ——— term thereof, for judgment against said lands and lots for said taxes, special assessments, interest and costs, and for an order to sell said lands and lots for the sat sfaction thereof; and shall give notice that on the ——— Monday next succeeding the day fixed by law for the commencement of such term of the said county court, all the lands and lots for the sale of which an order shall be made, will be exposed to public sale at the building where the county court is held in said county, for the amount of taxes, special assessments, interest and costs due thereon; and the advertisement, published according to the provisions of this section, shall be deemed to be sufficient notice of the intended application for judgment, and of the sale of lands and lots under the order of said court.

§ 185. All applications for judgment and order of sale shall be made at the May term of the county court.

* * * * *

If from any cause the collector is prevented from advertising and obtaining judgment at said term, it shall be held to be legal to obtain judgment at any subsequent term of said court.

(It may be here noted, that application for judgments for taxes and special assessments were made separately, and there were often a number of different sales of the same land for different special assessments and for taxes in the same year.)

§ 188. The collector shall file with the county clerk the list of delinquent lands and lots, which shall be made out in numerical order, and contain all the information necessary to be recorded, at least five days before the commencement of the term at which application for judgment is to be made, and said clerk shall receive and record the same in a book to be kept for that purpose; which book shall set forth the name of the owner, if known, the proper description of the land or lot, the year or years for which the tax or special assessment is due, the valuation upon which the tax is extended, the amount of each kind of tax or special assessment, the costs and total amount charged against such land or lot.

§ 191. PROCEEDING BY COURT. The court shall examine said list, and if defense, (specifying in writing the particular cause of objection) be offered by any person interested in any of said lands or lots, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. The court shall give judgment for such taxes and special assessments and penalties as shall appear to be due, and such judgment shall be considered as a several judgment against each tract or lot or part of a tract or lot, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such real property against which judgment is given, which shall be substantially in the following form:

Whereas, due notice has been given of the intended application for a judgment against said lands and lots, and no sufficient defense having been made or cause shown why judgment should not be entered against said lands and lots for taxes, (special assessments, if any), interest, penalties and costs, due and unpaid thereon for the year or years herein set forth, therefore it is considered by the court that judgment be and is hereby entered against the aforesaid tract or tracts

or lots of land or parts of tracts or lots (as the case may be) in favor of the People of the State of Illinois, for the sum annexed to each, being the amount of taxes (and special assessments, if any,) interest, penalties and costs due severally thereon; and it is ordered by the court that the said several tracts or lots of land, or so much of each of them as shall be sufficient to satisfy the amount of taxes (and special assessments, if any), interest, penalties, and costs annexed to them severally, be sold as the law directs.

Said order shall be signed by the judge.

§ 194. PRECEPT, PROCESS FOR SALE. The county clerk shall, before the day of sale, make a record of the lands and lots against which judgment is rendered, which shall set forth the name of the owner, if known, the description of the property, the total amount of judgment on each tract or lot, and the year or years for which the same is due, in the same descriptive order as said property may be set forth in the judgment book, and shall attach thereto a copy of the order of the court, and his certificate that such record is correct. Said record, so attested, shall be the process on which all real property, or any interest therein shall be sold for taxes or special assessments, as well as the record for the sale of such property.

§ 201. The collector, in person or by deputy, shall attend at the court house in his county, on the day specified in the notice for the sale of real estate for taxes, and then and there, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon proceed to offer for sale, separately, and in consecutive order, each tract of land or town or city lot, in the said list, on which the taxes, special assessments, interest and costs have not been paid. The sale shall be continued from day to day, until all the tracts or lots in the delinquent list shall be sold or offered for sale.

§ 204. If any collector, by himself or deputy, shall fail to attend any sale of lands or lots, advertised according to the provisions of this act, and make sale thereof, as required by law, he shall be liable to pay the amount of the taxes, special assessments and costs due upon the lots or lands so advertised. Said collector may afterwards advertise and sell such delinquent property to reimburse himself for the amount advanced by him.

§ 210. REDEMPTION. Real property sold under the provisions of this act may be redeemed at any time before the expiration of two years from the date of sale, by payment in legal money of the United States, to the clerk of the proper county, the amount for which the same was sold, etc.

§ 211. If any purchaser of real estate sold for taxes or special assessment shall suffer the same to be again sold for taxes or special assessment, before the expiration of the last day of the second annual sale thereafter, such purchaser shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale, during which time the land shall be subject to redemption upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay for the use of such first purchaser, the amount paid by him. The second purchaser shall be entitled to the redemption money, as provided for in the preceding section.

§ 216. Hereafter no purchaser or assignee of such purchaser of any land, town or city lot, at any sale of lands or lots for taxes or special assessments, due either to the state or any county or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or lots so purchased, until the following conditions have been complied with, to

wit: Such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written and partly printed notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire. If no person is in actual possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent inquiry, cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper printed in such county, and if no newspaper is printed in the county, then in the nearest newspaper that is published in this state to the county seat of the county in which such land or lot is situated; which notice shall be inserted three times, the first time not more than five months, and the last time not less than three months before the time of redemption shall expire.

§ 217. Every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance. Which affidavit shall be delivered to the person authorized by law to execute such tax deed, and which shall by him be filed with the officer having custody of the record of the lands and lots sold for taxes, and entries of redemption in the county where such lands or lots shall lie, to be by such officer entered on the records of his office, and carefully preserved among the files of his office, and which record or affidavit shall be *prima facie* evidence that such notice has been given.

§ 220. When any person shall hold more than one certificate of purchase at the same sale, and for the same years, tax or special assessment, the clerk shall, on the request of the holder of such certificates, include as many tracts or lots described therein in the deed of conveyance as such person may desire.

§ 221. FORM OF TAX DEED. The deed so made by the county clerk, under the official seal of his office, shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns, the title of the property therein described without further acknowledgment or evidence of such conveyance; and said conveyance shall be substantially in the following form:

STATE OF ILLINOIS, }
COUNTY. } WHEREAS, at a public sale of real estate for the non-payment of taxes, made in the county aforesaid on the——day of ——— A. D. 18— the following described real estate was sold, to-wit: (here place description of real estate conveyed), and whereas, the same not having been redeemed from said sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Illinois, necessary to entitle (insert him, her, them) to a deed of said real estate: Now, therefore, know ye, that I————County clerk of said county of———in consideration of the premises and by virtue of the statutes of the State of Illinois in such cases provided, do hereby grant and convey unto———his heirs and assigns forever, the said real estate hereinbefore described, subject however, to any redemption provided by law.

Given under my hand and the seal of our court, this——day of——— A. D. 18——

————County Clerk.

§ 222. EVIDENCE RECORDED.] County clerks shall record the evidence upon which deeds are issued, and be entitled to the same fee therefor that may be allowed by law for recording deeds.

§ 223 APPLIES TO FORMER SALES.] The foregoing six sections shall apply to all sales of real estate for taxes heretofore made, as well as to such sales for taxes and special assessments hereafter to be made.

§ 224. EFFECT OF DEED AS EVIDENCE.] Deeds executed by the County Clerk as aforesaid, shall be *prima facie* evidence, in all controversies and suits in relation to the right of the purchaser, his heirs or assigns, to the real estate thereby conveyed, of the following facts:

First. That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law.

Second. That the taxes or special assessments were not paid at any time before the sale.

Third. That the real estate conveyed had not been redeemed from the sale at the date of the deed.

Fourth. That the real estate was advertised for sale in the manner and for the length of time required by law.

Fifth. That the real estate was sold for taxes or special assessments, as stated in the deed.

Sixth. That the grantee in the deed was the purchaser or assignee of the purchaser.

Seventh. That the sale was conducted in the manner required by law.

§ 225. WHEN DEED MUST BE TAKEN OUT.] Unless the holder of the certificate for real estate purchased at any tax sale under this act, takes out the deed as required by law, and files the same for record within one year from and after the time for redemption expires, the said certificate or deed, and the sale on which it is based, shall, from and after the expiration of such one year, be absolutely null. If the holder of such certificate shall be prevented from obtaining such deed by injunction or order of any court, or by the refusal of the Clerk to execute the same, the time he is so prevented shall be excluded from the computation of such time. Certificates of purchase and deeds executed by the county clerk shall recite the qualifications required in this Section.

The CONSTITUTION of Illinois provides (Article I X, § 5): the right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the General Assembly shall provide by law for reasonable notice to be given to the owners or parties interested, by publication, or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: Provided, that occupants shall in all cases be served with personal notice before the time of redemption expires.

THE AMENDED BILL is shown upon pages 11 to 18 of the printed transcript.

Its averments were admitted by the demurrer.

THE AMENDED BILL begins: The defendant having

exhibited his plea to the bill in this cause wherein he alleges that he is the owner in fee of the lands in the bill described, claiming title thereto under and through two certain tax deeds (describing them by their dates and places of record), thereupon the plaintiff amends his bill, and respectfully shows unto the court that he is seized in fee simple of lots 1 to 8, and private alley north of said lot 7 of McKay's Subdivision of lots 1 to 6, in block 3 of Sutton's Addition to Chicago.

That defendant pretends and claims pretended title to said lands and premises in fee under and through two certain pretended tax deeds.

That the first of said pretended tax deeds was executed, acknowledged and delivered to said defendant by Herman Lieb, County Clerk of Cook County, Illinois, April 29, 1876, and recorded July 10, 1876, in Book 658, page 303.

The second of said pretended tax deeds was executed and delivered to said defendant by E. F. C. Klokke, the then County Clerk of Cook County, Illinois, July 16, 1879, recorded July 19, 1879, Book 869, page 608.

As by the said plea of the said defendant in this cause pleaded as aforesaid, will fully and particularly appear.

And said defendant in and by his said plea by him above pleaded, says and insists that the said pretended tax deeds are matters of record, and are well known to this plaintiff.

The following is a true copy of the said record of said pretended tax deed bearing date Aril 29, 1876, as the same appears in said book 658, of records of Cook County, at page 303.

Then follows a copy of the record of that deed. It recites that at a public sale of real estate for non-payment of taxes made in the County of Cook and State of Illinois, on the 30th day of October, A. D. 1872, the following described real estate was sold.

(There is no other description of the sale; no statement of what taxes the sale was made for; no reference to any judgment; nothing to identify the lien claimed but the bare statement that the real estate was sold for taxes on October 30, 1872. In this, the deed is as authorized by the statute, Section 221, above quoted. But this

feature is to be remembered in considering the averments of the bill subsequently made.)

The next clause in the deed affecting the land in question is: "Also at said sale on the 9th day of November, A. D. 1872, lots 1, 2, 3, 4, 5 and 6, block 3, Sutton's Addition to Chicago."

(The same comments as above, here apply. The kind of taxes claimed, for what year they are claimed, whether or not there was a judgment, and if so, when the judgment was rendered, is not suggested in the deed.)

(It will be observed that the bill alleges that the plaintiff is seized of lots 1 to 8 and of the private alley north of lot 7, in the subdivision of lots 1 to 6, in block 3, of Sutton's Addition, while the defendant claims title to that land under the description of lots 1 to 6, in block 3, of Sutton's Addition.)

The deed then recites that, whereas, the same not having been redeemed from said sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Illinois necessary to entitle him to a deed of said real estate, now, therefore, I, Herman _____, convey, etc. Signed, Herman Lieb, County Clerk.

(This deed or paper is signed, Herman Lieb, County Clerk, but is not under seal of the court. It does not contain the name of the clerk in the granting clause, as required by the statute. For these reasons, if the record is true, it is void on its face, as the statute evidently requires the deed to be under the seal of court.)

(As the sale was November 9, 1872, and the deed was not given until April 29, 1876, this deed would be void under Sections 225, 210, 211, above shown, if it was not for the exceptions contained in those sections.)

The bill alleged (Transcript, p. 12) that though said record is void on its face and insufficient to show any conveyance of land, it is yet a cloud on plaintiff's title, because the record may be imperfect through fault of the scrivener in omitting to record a seal of court, and in giving no name of the grantor in the body of the deed, and the record is only *prima facie* evidence of the original deed.

(Transcript, p. 12.) "Plaintiff alleges and charges that there was no advertisement of any public sale of real estate for the non-payment of taxes to take place on the 9th day of November, A. D. 1872, in said Cook County; and if any such sale of said lots was made on that day it was without advertisement."

(This is admitted by demurrer; and sale without advertisement is void. *Charles* v. *Waugh*, 35 Ill., pp. 322–3; *Spelman* v. *Curtineus*, 12 Ill., p. 413; *Thompson* v *McLaughlin*, 66 Ill., p. 409; *Senichka* v. *Lowe*, 74 Ill., pp. 275–6.)

The bill next alleges and charges (Transcript, p. 13): "There was no judgment or precept on which said lands could have been sold on that day."

(This also is admitted by demurrer. Sale without judgment, or sale without precept is void. *Atkins* v. *Hinman*, 2 Gilman, 437; *Hinman* v. *Pope*, 1 Gilman, 131; *Bailey* v. *Doolittle*, 24 Ill., 577; *Holbrook* v. *Dickinson*, 46 Ill., 285; *Ogden* v. *Bemis*, 125 Ill., 106; *Bell* v. *Johnson*, 111 Ill., 381; *Gage* v. *Carraher*, 125 Ill., 454.)

(Sale without notice, judgment or precept is a *fraud* upon the law; an issue or acceptance of tax deeds fair on their face, where there has been no foundation for them, presents the strongest kind of a case for appeal to chancery to remove the cloud. *Gage* v. *Graham*, 57 Ill., p. 146.)

The bill next alleges (Transcript, p. 13): "There were no taxes unpaid upon said land for which sale could on that day have been made." (Sale was therefore void. *Mason* v. *Chicago*, 48 Ill., 420; *Gage* v. *Rohrbach*, 56 Ill., p. 265; Rorer on Judicial Sales, Secs. 720–727; *Hinman* v. *Pope*, 1 Gilm., p. 138.)

(This is also admitted. Appellant's counsel, in his brief, complains that appellee as plaintiff below did not in his bill offer to pay the defendant therein anything. But he admits by the demurrer that there were no taxes upon the land for which the sale could have been made. The case is entirely different from those which the learned counsel names in his brief, where lawful taxes were actually discharged by sale, and the land relieved of a burden which

it was the duty of the respective plaintiffs in those cases to have discharged.)

The bill contained this charging part (Transcript, p. 13): "And these plaintiffs charge that if there was any such sale, as is so falsely pretended, on or about the 9th day of November, A. D. 1872, it was secret, pretended and fictitious; that it was made for pretended taxes, based on pretended and void assessment, without any judgment of any court having jurisdiction of the subject-matter, and without any precept from any court of record having jurisdiction to issue such precept."

(This matter which was admitted by the demurrer, was sufficient to show the deed void. It was substantially like the charging part of any bill. 1 Daniell's Chancery Practice, 373, Ch. 6, s. 5.)

The bill further alleges (Transcript, p. 13): "This plaintiff further alleges and charges that no notice to redeem said lands from such pretended sale was given by the holder of any certificate of such sale, as required by the Constitution and Statutes of Illinois."

(The provision of the constitution requiring the general assembly to provide by law for reasonable notice to be given to the owners or parties interested, and section 216 of the revenue statutes prescribing the notice, are above quoted. The averment is that no notice was given. This is admitted by the demurrer. For want of such notice the deed was void. *Williams* v. *Underhill*, 58 Ill., pp. 139, 140; *Holbrook* v. *Fellows*, 38 Ill., 440. And further, the deed was procured by Gage in fraud of the owner's rights. *Dalton* v. *Lucas*, 63 Ill., 337; *Bowman* v. *Wettig*, 39 Ill., pp. 427–8; so that equity would, in any event, set aside the deed because of the fraud. And it devolved on the holder of the tax title to prove the notice when the deed was challenged. *Williams* v. *Underhill*, 58 Ill., p. 140.)

The bill further avers: "That no such notice, or evidence thereof, was filed or recorded by the County Clerk of Cook County."

(This is admitted. And it is thereby admitted that the

evidence required by Sec. 217, printed above, which was necessary to give the County Clerk authority to issue a deed has never existed in the proper custody; and that the issue, as well as the procurement of the deed, was fraudulent, *Dalton* v. *Lucas*, 63 Ill., p. 339; *Bowman* v. *Wettig*, 39 Ill., pp. 427–8, and that the deed was wholly void. *Dakes* v. *Rowley*, 24 Ill., p. 221.)

There are averments at the foot of page 13 and top of page 14, and on page 16, that by the laws of Illinois such deed cannot be read alone without judgment and precept; and also that the deed though read with the judgment and precept, is only *prima facie* evidence. (See *Spellan* v. *Curtenius*, 12 Ill., 411.)

An amendment of 1879 allows the deed to be read alone and to have the effect as evidence shown in Sec. 224 above printed. (*Ransom* v. *Henderson*, 114 Ill., 531.) The bill contains further averment, that, by the laws of Illinois, neither the judgment nor deed are conclusive evidence, but that the *prima facie* case they make may be overcome by evidence. This is in conformity with the decisions. *Belleville Nail Co.* v. *The People*, 98 Ill., 399; *Riverside Co.* v. *Howell*, 113 Ill., 262–3; and these matters of law are proper to be stated in the bill. 1 Daniels, Ch. Pr., 372, Chap. VI., Sec. 3. They are doubly so in a bill in the United States Court; for, though the Illinois courts have decided, that *a deed void on its face*, or a paper without seal and, therefore, no deed, may be a cloud upon title to be removed by bill, (*Stout* v. *Cook*, 37 Ill., 283; *Campbell* v. *McCahan*, 41 Ill., 45, p. 49; *Fitts* v. *Davis*, 42 Ill., 391; *Hodgen* v. *Guttery*, 58 Ill., 438; *Gage* v. *Graham*, 57 Ill., 144, pp. 146–8), some of the early decisions in the United States Supreme Court, and in the older states, especially New York, held that a deed void upon its face, or without seal, was no cloud, and that a bill would not lie to remove it and quiet title. But the same cases held, that where such instrument might be made good by extrinsic evidence, or where the paper appeared good upon its face, and could be made to appear void by extrinsic evidence, a bill to remove the cloud, and quiet title, in the nature of a bill *quia timet* would lie. The bill before us makes the aver-

ments which show that both tax deeds are subject to be avoided by extrinsic evidence. This bill is good under either rule. (*Reynolds* v. *Crawfordsville Bank*, 112 U. S., 410, 411.)

Upon page16, the bill states, that the plaintiff does not know, and cannot ascertain with certainty, for what taxes, assessments, interest, costs and amounts defendant pretended to have purchased said lands, or pretends to have entered into the pretended sale, mentioned in and on which said pretended deed depends, unless said defendant shall discover the same. But the plaintiff charges that said amounts, or some of them, or some part of them respectively, are and were illegal and no lien on said lands, and did not and could not authorize sale thereof. The court will see by reference to the statute authorizing the issue of a tax deed, and particularly by reference to section 221, above quoted, prescribing the form of a tax deed, as well as also by reference to the tax deeds copied in the bill, that the plaintiff had nothing to point him to the taxes claimed to enter into the sale. The learned counsel for appellant answers the averments of the bill, that there was no advertisement for the sale of real estate on the 13th day of October, 1876, and no judgment or precept ordering the sale on that day, by saying, "The reply to this is that there was no law requiring it." We disagree with the counsel in his claims; but we use his claim, to call the attention of the court to the absolute truth of the bill in this particular. Section 182 of the statute required judgment to be taken at the May term, and sale to be immediately after. Other provisions allowed applications to be made later. In point of fact, there are cords of books of tax sales in Cook County; hundreds, and perhaps thousands, of judgments for different taxes and special assessments in the years from 1871 to 1879, respectively. Where judgment had been entered before the constitution of 1870, and cases had gone to the Supreme Court, they could come back, and did come back, at any time after affirmance, and sales could be made by the officers of the cities, and deeds issued by the county clerk like that held good in *Garrick* v. *Chamberlain*, 97 Ill., pp. 630–632. Judgments were rendered for city taxes which were wholly void.

Hills v. *Chicago*, 60 Ill., 85; *Webster* v. *Chicago*, 62 Ill., 302. Separate judgments were rendered in 1872 and 1873, which were void: *Smith* v. *Chicago*, 75 Ill., 36. Under a statute of 1873 judgments were rendered for city taxes of Chicago of the years 1869, 1870, 1871 and 1872, separate from other taxes; *Andrews* v. *The People*, 75 Ill., 606. In this last case it was held that some of those judgments were void. The legislature passed another bill, under which proceedings were had which, in one case, were held to be wholly valid. *Spring* v. *City of Olney*, 78 Ill., 101. Then, in a case some time later, the Supreme Court of Illinois reconsidered the city tax law which it had sanctioned in the City of Olney case and found it to be defective and incapable of giving a court jurisdiction, because of a *casus omissus*,—an omission to specify how the officer applying for judgment was to get the information he was required officially to give to the court as the basis of his application. Therefore the Supreme court held the act inoperative in *Otis* v. *The People*, 74 Ill., 384. Then the legislature amended the city tax act in the particulars found defective. A case under the amended statute (of 1874) reached the Supreme Court in due course, and a year and a half after the final amendment the whole city tax act was found unconstitutional and void. A petition for rehearing was presented and the whole subject again carefully considered, but about the first of 1877 the opinion was finally adopted finding the statute null. (*The People* v. *Cooper*, 83 Ill., 585.) Upon each of these applications judgment was rendered against all property for which a contest was not made, and such property was sold for the taxes ultimately found to be void. During the same years there were hundreds of judgments for special assessments in each year, and it was not until the case of *Gage* v. *Parker*, 103 Ill., pp. 536–540, that the authorities and the court deemed it best to have all applications for judgment and order of sale made at the same term of court. That case shows that the Supreme Court considered *three different sales of the same land*, made in the same year and within six weeks of each other, to be valid. Under that case there might have been twenty judgments, and they might have been at different terms of court. *Karnes* v. *The People*, 73

Ill., 274; *Andrews* v. *The People*, 75 Ill., 605, and *Law* v. *The People*, 80 Ill., 268, add illustrations of the confusion of the years from 1871 to 1879.

Not one in ten thousand of the sales of land for taxes in Chicago from 1871 to 1877 has been mentioned in the reports of the court. Many of the opinions of the Supreme Court upon such cases were left unpublished; the title to the case being mentioned by the reporter upon a fly leaf or in a note at the foot of the page, through the volumes; but enough has been said and enough of references have been made, to show the court, that the averment of the bill, confessed as it is by demurrer, is literally true, that the plaintiff does not know and cannot ascertain for what taxes or assessments the pretended sale of November 9, 1872, or of October 13, 1876, or either of them were made. The subject is in the keeping of the defendant. He knows or ought to know whether there was a judgment or precept authorizing a sale on either of those days when he claims to have purchased. The plaintiff avers that there was no judgment nor precept. Defendant admits this averment in all its scope. Under such an averment, the defendant having the knowledge — being in a position where to conceal his knowledge is a fraud upon the plaintiff, if defendant desires to claim that there was a judgment, or a precept, he should have set them up, described them, and claimed under them. But he admitted that there was no judgment and no precept. The defendant having two deeds, reciting that the plaintiff's land had been sold to him and conveyed to him upon two distinct sales for taxes, one of November 9, 1872, and the other October 13, 1876, and having put those two deeds upon the record, to warn all subsequent purchasers that the plaintiff's title to this land had been sold for taxes on those days, that the time of redemption had expired, and that the plaintiff's title was gone, and vested in defendant—this defendant ought to know for what taxes or what pretended claim defendant pretended to purchase the land at those dates. The dictionary section (Sec. 294) of the Revenue Law above quoted says that the word "tax" shall mean any special assessment, or costs, interest, or penalties, imposed upon property. The defendant ought to know for what he bought

the plaintiff's land. The plaintiff says, he does not know and cannot ascertain. The plaintiff in his bill avers as to the first sale (Transcript, p. 13): "There were no taxes "unpaid upon such land for which sale could on that "day have been made." As to the second sale he says (Transcript, p. 13): "there were no lawful taxes due or "unpaid upon which said land could, or ought to have "been sold on that day." These averments are admitted by demurrer. The defendant refused deliberately after having had leave to answer. He deliberately resolved (Transcript, pp. 20-21) as appears by the record "The defendant elects to stand by his demurrer, *and that* "*he will not make other answer to the amended bill* of com- "plaint of the said plaintiff, which is ordered by the court "to be entered of record, and the said bill taken for con- "fessed by the said defendant."

(Transcript, p. 15.) As to the second deed, "This "plaintiff alleges and charges the truth to be:

"That there was no advertisement of any public sale "of real estate for the non-payment of taxes to take "place on the 13th day of October, 1876, in said Cook "County.

"There was no judgment or precept of any court of "record of said Cook County requiring said lands to be "sold on that day.

"There were no lawful taxes due or unpaid upon "which said land could or ought to have been sold on "that day."

Either of these averments, which are admitted to be true, show the tax deed wholly void, and show the sale to be wholly void.

(Transcript, p. 16.) "This plaintiff further alleges "and charges that notice to redeem said lots of this "plaintiff, from said pretended sale was not given, as re- "quired by the constitution and statutes of Illinois.

"And that no such notice or evidence thereof was "filed with or recorded by the County Clerk of Cook "County."

We will refer hereafter to authorities, showing that this pleading was good and sufficient, and that the de-

fendant in the most solemn manner elected to admit, and allow the court to go to judgment on his admission, that there was no advertisement of any sale to take place on the day named in the deed, that there was no judgment or precept requiring the land to be then sold, that there were no lawful taxes due or unpaid upon which the land could have been sold upon that day, that notice to redeem was not given as required by the constitution and statutes, and that no such notice or evidence thereof was filed with or recorded by the county clerk. If advertisement, judgment, precept, taxes, notice, or evidence of service of any notice existed, they were within the knowledge of the defendant and he could have stated them. Instead of that, he deliberately elected to admit that none existed.

(Transcript, p. 16.) The bill further alleges that if defendant would give a statement and schedule of the taxes, interest, costs and other amounts for which the pretended sale mentioned and referred to in the above described pretended tax deeds were made, if any such sales were in fact made, it will appear or can be shown, that such amounts comprise divers illegal sums, and that each of said pretended sales was made, if made at all, for sums in whole or in part illegal, or that had been paid and that were not liens or claims on the land; but this plaintiff does not know and cannot ascertain with certainty for what taxes, assessments, interest, costs, and amounts said defendant pretends to have purchased said land, or pretends to have entered into the pretended sale mentioned and on which said pretended deeds depend, unless said defendant shall discover the same; but the plaintiff charges that said amounts or some of them or some part of them respectively are and were illegal and no lien on said land, and did not and could not authorize sale thereof.

All this is admitted. The defendant admits that these things would appear if he would make a schedule or statement of what he claims. He admits that if he would give a statement of his claims it would appear or could be shown that those claims are illegal. And he admits that the plaintiff does not know and cannot ascertain with

certainty for what taxes, etc., he pretends to have purchased the land, or pretends to have entered into the pretended sale, and on which the pretended deeds depend, unless he will discover the same. But he says he will not discover them; will not tell the court what they are; will not place the court in possession of the particulars of his claim.

(Transcript, p. 16.) The bill further alleges: "That said land could not lawfully be assessed by the description shown in said pretended tax deeds, but could only be assessed by the description given in the original bill in this case. That the original six lots, namely, lots 1 to 6 in block 3, Sutton's Addition fronted east on Paulina street; and the same were by plat duly acknowledged October 4, 1871, and recorded October 6, 1871, subdivided as follows": The bill then shows the new subdivision into 8 lots with a private alley and proceeds, "*and said lots in* "*said new subdivision were conveyed to divers persons to* "*whom they were assessed severally, from said year 1871,* "*until said year 1876.*"

All this is admitted by the defendant. And we may call the attention of this court to this, in connection with our statement of the multiplicity of taxes, assessments and sales from 1871 to 1877. Here it is admitted as a fact, that these lands were assessed every year from 1871 to 1876, as 8 lots as shown on the plat in the transcript, page 17, to divers persons, each lot being assessed severally from the year 1871 to 1876. It is clear that when the plaintiff below looked to find what taxes Gage pretended to have deeds for, he could not find them based upon any of the regular assessments, for Gage had no sale of any lot assessed according to the re-subdivision in the name of the respective owners, or of any of those owners of the several lots in the re-subdivision. The bill alleges that the six original lots in Sutton's Addition fronted east on Paulina street. Looking at the plat on page 17 of the transcript, we see that each of the six persons, who owned these several lots in the new subdivision fronting upon Harrison street, must have owned parts of each of 4 of the original lots which fronted on Paulina street.

(No owner would look for a tax by the old subdivision, and taxation by that would be void. *Gage* v. *Rumsey*, 73 Ill., 473.)

Ascertaining the values which are to apportion the taxes among the several owners is judicial. (*Rich* v. *Chicago*, 59 Ill., 286.) The Constitution provides for the appointment of the person or persons to whom the power is to be committed, and commits the power. The first section of the Constitution is that no person or persons, being of the Legislative or Executive departments of the government, shall exercise any power properly belonging to the Judicial department. In 1866 or 1867 John M. Wilson, Chief Justice of the Superior Court of Chicago, delivered a careful opinion, finding that no one but the assessors regularly appointed could ascertain the apportionment of taxes, and that no tax could be collected by force from any individual unless his property was assessed separately from that of all other persons. The principle was recognized in *Roby* v. *Chicago*, 48 Ill., 130, by the Supreme Court, and was distinctly established in *Howe* v. *The People*, 86 Ill., 288.

It is apparent, that if, as is admitted by the defendant, these lots in the re-subdivision were owned by diverse persons, and from 1871 to 1876 were severally assessed in the names of their respective owners, there was something very irregular in this deed in 1876 of the lots in the original subdivision, some of which had been regularly assessed as parts of six several and distinct lots, belonging to six several and distinct persons, from 1871 to the time of that sale. The court takes judicial cognizance of historical events. The Chicago fire took place October 8th and 9th, 1871. The re-subdivision was completed October 6, 1871, and from that time all of the assessments and taxes were severally upon the several lots in the new subdivision, which were assessed to or in the name of their several owners, as appears upon page 17 of the transcript.

We have seen by Sec. 188 of the Revenue law, that the tax judgment must contain the valuation upon which the tax is extended, the amount of each kind of tax or special assessment, the year or years for which the tax is due. Nothing of the kind is contained in these tax deeds. The

records, of all years when the land may have been assessed as the original six lots in Sutton's Addition before they were subdivided into 8 lots in 1871, were destroyed in the conflagration.

The defendant demurred to the amended bill (Transcript pp. 18--19), stating several grounds of special demurrer, and concluding with the general demurrer for want of equity.

The grounds of demurrer so stated, are not necessary to the statement of the case. We therefore pass them at this point to take them up in our brief in answer to the brief for the appellant upon matters of law.

We will, however, here refer the court to the order of the Circuit Court disposing of the questions raised by that demurrer which was entered March 22, 1886 (Transcript, p. 20): "After hearing the arguments of counsel, the "court overrules said demurrer; and, *on motion, leave is* "*given said defendant to plead or answer within 20 days;* "*and to set up in said plea or answer the same defense con-* "*tained in the said demurrer.*"

March 26, 1886, 16 days before the time so granted, the defendant, on his own motion, to answer or plead to the bill setting up the same matters he had alleged in his demurrer, he went before the court and *waived the privileges* which had been granted to him, the entry being: "Now again come the parties to this cause, by their "respective solicitors, *and the defendant elects to stand by* "*his demurrer and that he will not make any other an-* "*swer to the amended bill*, of complaint of the said plaintiff "*which is ordered by the court to be entered of record, and* "*the said bill taken for confessed by the said defendant*, "and thereupon this cause coming on to be heard upon "the original bill and the demurrer and plea of the de-"fendant thereto pleaded, and the said amended bill "taken for confessed as aforesaid, upon the overruling of "the demurrer of the defendant thereto *and his election* "*to stand by said demurrer and to make no other or fur-* "*ther answer to said amended bill;* and the court having "heard the arguments of counsel for the respective par-"ties, and duly considered the matter, doth find the

"equities to be with the plaintiff, and that he ought to "have relief, and that his title ought to be quieted and "the cloud removed therefrom, as prayed in said bill and "said amended bill."

And thereupon the decree proceeds to grant the relief.

MATTERS OF LAW ON FOREGOING CASE.

The learned counsel for the appellant, in his brief, first assails the averments of the bill, saying that nowhere in the bill is there any allegation which can imply that the complainant does not possess an adequate remedy at the common law. This is in fact one of the special demurrers pointed out in the Court below. The learned counsel upon the same page (6) suggests that the bill does not contain the old jurisdiction clause, that plaintiff has no adequate remedy by the strict rules of the common law; and under the same point the learned counsel suggests that in all such bills it must appear that the plaintiff is either in possession of the property, or that the property is vacant and unoccupied. The first case cited by the counsel to support his views is the case of *Hamilton* v. *Quimby*, 46 Ill., 90, p. 98, which was overruled in the Gage cases above cited from the 56th Ill. and in *Reed* v. *Tyler*, 56 Ill., 291.

First, upon the objection to the want of the jurisdiction clause, we read in DANIELLS Chancery Practice, 374 at the last part of Sec. 5, Chap. VI: "The model of a bill, "it will be observed, contains no charging part, and such "a mode of statement can never be said to be absolutely "necessary; but there are cases where it may still be use-"ful, though the comparative simplicity of modern plead-"ings will diminish most materially the occasions for its "use. Bills used formerly to contain a precise averment "of jurisdiction in the court. *This is now obsolete, and* "*was never absolutely requisite.*" The note to the 4th American edition, sustaining this last expression, refers to Story's Equity Pleadings, Sec. 34, to 11th Conn. 369, and to the 21st Equity Rule of the Supreme Court of the United States, expressly sanctioning the omission of the jurisdiction clause.

But the main point, urged by the counsel, is, that there is no allegation which can imply that the plaintiff does not possess an adequate remedy at the common law. The averment in the original bill (Transcript, p. 2), was that he, said plaintiff, is seized in fee simple of lots one, etc. By his demurrer (Transcript, p. 8), the defendant said that in and by his said bill of complaint it does not appear that the said complainant is in possession of the said lands and premises or that said lands and premises are vacant and unoccupied, or that they are not in possession of the defendant.

(Transcript, p. 11). The Circuit Court overruled that demurrer.

The amended bill (Transcript, p. 11), says: "That he, said plaintiff, is seized in fee simple of lots one, etc."

To this the special demurrer is (Transcript, pp. 18-19):

"That it does not appear in and by said amended bill "of complaint who is in possession of the property there- "in described, neither does it appear that this defendant is "not in possession thereof, neither does it appear that said "complainant hath not an adequate remedy at the common "law."

This demurrer the Circuit Court overruled, and with good reason, for we read 1 DANIELLS Ch. Pr., 362, Chap. VI, Sec. 5: "Although the rules of pleading in courts "of equity, especially in the case of bills, are not so strict "as those adopted in courts of law, yet, in framing plead- "ings in equity, the draftsman should adhere as closely as "he can to the general rules laid down in the books which "treat of common law pleadings, whenever such rules "are applicable to the case which he is called upon to "present to the Court: For there can be no doubt, that "the stated forms of description and allegation which are "adopted in pleadings at law have all been duly debated "under every possible consideration, and settled upon "solemn deliberation, and that, having been established "by long usage, experience has shown them to be pref- "erable to all others, for conveying distinct and clear "notions of the subject to be submitted to the Court; and "if this be so at law, there appears to be no reason why "they should not be considered as equally applicable to "pleadings in courts of equity, in cases where the object

"of the pleader is to convey the same meaning as that "affixed to the same terms in the ordinary courts. Thus "as at law, if a man intends to allege *a title in himself to "the inheritance or freehold of lands or tenements in pos- "session, he ought regularly to say that he is seized*; or if "he allege possession of a term of years or other chattel "real, that he is possessed." (Authorities in note supporting this text are Stephen on Pleading, 233, 242; Whitworth Eq. Prec. 162, n. *et seq.*)

These are strong precedents. Modern pleading has not attempted to introduce great prolixity at the expense of the sense, and where, for 500 years, the averment, like this in the bill, that the plaintiff is seized in fee simple of the land, has in all courts of law and equity been a perfect allegation of title in himself to the freehold in possession, the averment is of the most approved character to show the most complete estate in the land in possession. If the defendant, claiming title to the land under his deed, was in possession, the plaintiff would be dis-seized. The defendant admits by his demurrer that the plaintiff is seized, with all that that implies. A person seized of land could not at common law bring an action of dis-seizin, for he is not dis-seized. He could not bring an action of ejectment because at common law if seized he is in possession and he cannot aver that the defendant has entered upon his possession and put him out of possession of the land, that is dis-seized him. There was no action that he could bring at the common law for his title and possession until he had been dis-seized and his right to the land had been changed from that seizin which was the essential of actual delivery and holding of possession of the land, into a mere right of action. If his remedy was at common law, it was because he had a mere right of action and not the seizin. At common law and even now there are cases known as cases of dis-seizin at election where the person in possession may elect to consider himself dis-seized for the purpose of bringing an action. But so long as he is seized and maintains that he is seized, he has no action against the claimant under an adverse title who is not seized. Two adverse claimants cannot be seized of the same land at the same time, the one is seized and the other is not seized. In delivery of seizin it was necessary

to see that all other persons were out of the land and seizin or possession delivered, remained, and the possessor could not deny that he was seized or possessed until some one had put him out of the land and held possession against him. It is wholly immaterial who is in actual possession of the land, provided the plaintiff is seized in fee simple of that land; for the possession of the actual occupant is the possession of him who is thus seized. And if the defendant who is not seized and who cannot be seized so long as the plaintiff is seized in fee simple of the land (which this demurrer admits) has got some kind of a deed which he will not assert to dis-seize the plaintiff either by entry under that deed or by action to dis-seize the plaintiff, the plaintiff has no adequate remedy at the common law. Indeed he has no remedy at all at common law except an action for slander of title or trespass on the case for recording the cloud. And it is very doubtful whether such actions have ever been resorted to in such a case.

In *Runnington on Ejectment*, we read (page 47): "For every complete title to lands, there are two things necessary, the *possession* or *seizin*, and the right or property therein; or as it is expressed by Fleta, *Juris et seizinae conjunctio.*" In the following pages to 59, the author treats of the remedies for trial of title to land, and of seizin and dis-seizin. It is apparent that in many cases the assize would no more try the title to the land than the modern action of forcible entry and detainer; and that a person seized had no way at common law to relieve his title from the cloud of an adverse claim of title, but *to confess himself dis-seized.* Suppose the land vacant, or that the adverse claimant enters as a trespasser on the owner's possession, the owner may have lost his deeds or have some infirmity in his title; his strong point is that he is seized; and so long as he is seized, the adverse claimant can not put him to prove his title, but must prove his own. So long as he is seized, he has no remedy at common law against the holder of the disturbing claim or cloud, which diminishes the value of his seizin. The common law held, that if he elected to remain seized, he did not require a remedy to quiet his title or to remove a cloud; equity gives the remedy, because therein the common law is inadequate to afford relief.

We might note that in *Ward* v. *Dewey*, 16 N. Y., p. 521, the averment like this in the bill was taken as of course to be the perfect averment of possession, as at common law. So also in *Emery* v. *Cochran*, 82 Ill., 65.

While there have been great changes in the relative meaning of the word seizin, during the decline of feudal tenures, and the changes in forms of action, which are so carefully reviewed in Runnington's treatise (47–57) and by Ld. Mansfield in *Taylor* v. *Horde*, there cited, the word remains in the language as meaning that possession under color of right, which, whether actual or constructive, precludes the idea that any other person is in possession of any part of the lands or tenements under color of any adverse right. It is because of this that Daniells is so distinct and positive as to the propriety of using the words *seized in fee*, in a bill, to denote complete title to land in possession.

The second ground objected by the counsel for appellant is that appellant has not offered to pay appellee any money, and the counsel cites three cases upon that point, on page 8 of his brief.

In the first and third of those cases it was averred in the bill that the defendants had actually paid large amounts of lawful taxes on the land and extinguished them. In the other case the facts were admitted. All three were cases which were fully tried upon full pleadings, replications and evidence.

The case at bar is different. We have seen that the averments were, that there were no valid taxes on which the land could have been sold on the days stated. That being so, and Gage admits it, there is no reason why the plaintiff should offer to pay. If Gage had answered fully and set out what taxes he claimed to have paid, if any, then the plaintiff might have been required to amend his bill and offer to pay any taxes which appeared legal upon their face; but prior to 1871 any taxes for which the land was offered for sale were carried forward from year to year, if there were no bidders, and at the end of five years the land was offered to the highest bidder, and sold for what it would bring, and the residue of the back taxes were forgiven. It was then and is still the law, that taxes

omitted from year to year from the tax list *cease to be liens* on the land against purchasers. *Law* v. *The People*, 116 Ill., 244. Revised Statutes of Ills., Ch. 120, § 277:

"If the tax or assessment on property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceeding or other cause, the amount of any such tax or assessment, which such property should have paid, may be added to the tax on such property for any subsequent year, in separate columns, designating the year or years.

§ 278. No such charge for tax and interest of previous years, as provided for in the preceding section, shall be made against any property prior to the date of ownership, of the person owning such property, at the time the liability for such omitted tax was first ascertained."

The bill showing that there were no taxes due or unpaid on the land at the dates named for which the land could have been sold, and nothing showing anywhere that Gage had paid one penny to relieve any burdens upon the land, there was no reason why the plaintiff should offer to pay him anything.

But the demurrer of the defendant below, shown on the transcript at p. 19, is bad because it is what is known as a speaking demurrer, viz:

"And for further cause of demurrer this defendant "saith, that said complainant in and by his said amended "bill of complaint while seeking the aid of this court of "equity to relieve him of tax titles acquired and owned by "the defendant, for the purchase of which the defendant "has paid out divers sums of money, as appears by the "said amended bill of complaint, doth not offer to do "equity towards the defendant in this behalf, and doth not "offer to repay the taxes so shown by said amended bill "of complaint to have been paid by said defendant."

Daniells says, p. 587, Chap. XIV, Sec. 3: "Care must "be taken in framing a demurrer that it is made to rely "only upon the facts stated in the bill; otherwise it will "be what is termed a speaking demurrer and will be "overruled."

The bill does not state that defendant had paid a dollar. That he paid anything can only be discovered from the averments of the demurrer, and he refuses to state that he paid anything, or what he has paid, or what he paid it for.

The next objection made by the defendant is as to the

discovery: that the matters concerning these tax deeds are public record.

We have seen above in the statement, that while the deeds are recorded, they do not point out any record; and the appellant admits both by his demurrer, and his brief, that there was no notice, judgment or precept requiring sale to be made on the day of the pretended sale. He also admits that there was no tax due on which sale could have been made on that day; and he refuses to discover what taxes he claims that the sale was made for. The bill shows (Trans., p. 17), that from 1871 to 1876 the land was assessed each year in eight lots to the several owners by an entirely different subdivision from that given in the tax deeds. Upon this head, the averment in *the demurrer states that the matters are all matters of public record*, and within the reach of the complainant. In this, also, the demurrer is a speaking demurrer. Exactly the contrary is averred in the bill and admitted by the demurrer.

The next point of demurrer alleged is that there is no affidavit annexed to the bill. Looking at *Daniell's Chancery Practice*, at page 392, Chap. VI., Sec. 6, we find it stated, that where the party seeks the discovery of deeds, in order that he may bring an action at law upon them, he must annex the affidavit. "But a bill for discovery merely, or which only prays the delivery of deeds or writings or equitable relief grounded thereon, does not require such an affidavit."

The other reference is modified upon the following page, 580, where the author says, that if the plaintiff is entitled to discovery of deeds or other documents, for the purpose of establishing his own case, his right to such discovery will not be affected by the circumstance that the same documents are evidence of the defendant's case also.

In Cooper's Equity Pleading, Chap. III, Sec. 13, we read:

"To a mere bill of discovery, as has been before no-
"ticed, an affidavit is not necessary. If, however, a bill
"of discovery seeks to draw the jurisdiction from another
"court into equity, an affidavit must be annexed."

"If a bill merely prays the delivery of deeds or writ-"ings or equitable relief grounded thereon, such affidavit "is not required."

The same author, Chap. III, Sec. 9, says: "A plaintiff "is entitled only to a discovery of what is necessary to "his own title, and not to pry into that of the defendant." But qualifying this, in the same section the author says, on a number of authorities, that an heir has a right to a discovery, "by what means and under what deed he is disinherited."

In this case, Gage claims to have got away plaintiff's title. He has not entered on the land and disseized plaintiff; he will not bring an action at law against plaintiff; plaintiff cannot find what taxes he claims; plaintiff avers that there were no taxes unpaid, for which the land could have been sold; and he comes into court with his bill *quia timet* to have his title quieted and the secret claims of Gage, if he has any, produced and set at rest. The case would be an entirely different one if Gage had disseized him and was in possession, and he came into equity to demand of Gage to disclose his defense. Then an oath would be required.

The next ground of demurrer is, that plaintiff, in his bill, has alleged Gage's deeds, which are *prima facie* evidence contrary to the allegations of the bill, and defeat the facts stated in the bill.

The opposite of this proposition is true. The facts stated in the bill and admitted by the demurrer, disprove the *prima facie* case which the deeds alone would make. This averment of the demurrer, and of appellant's brief, shows that the bill is properly grounded. The deeds upon their face, or at least the second, is evidence of facts fully sustaining its validity. By the law, evidence of contrary facts must be given to overcome it. The bill alleges those contrary facts; the demurrer admits those contrary facts. The deed is therefore void; though it and the record of it appear on their face to show a valid tax title as far as any deed in itself can show such title.

The brief of the counsel for appellant proceeds from claiming that the assailed deed makes an impregnable case because it is *prima facie* evidence of facts which the

appellant by his demurrer admitted to have no existence, to claim that the bill alleged that there was a judgment and that the bill makes no attack upon the judgment. But the bill makes no such admission. It says that it is incumbent on a person claiming through a tax deed to prove a judgment. This was after it had averred that there was no judgment. The bill further says that a judgment for taxes is not conclusive evidence in Illinois, but may be disproved. These two references, to a judgment in the abstract, may be surplusage, but they do not withdraw the averment that there was no judgment or precept. The averment is, that if the defendant would give a statement and schedule of the taxes, interest and costs and other amounts for which the pretended sales mentioned and referred to in the pretended tax deeds were made, if any such were in fact made, it will appear etc., that those sales were for void claims or for taxes that had been paid, and this the defendant admits, as well as that there was no notice, no judgment nor precept requiring sale on the day named. And here it may be noticed that the appellant quibbles. He says that the notice, judgment and precept fixed the first day, and that the sale may be continued from day to day, if one day is insufficient to complete it. So that by the law the notice, judgment and precept require the sale to be made on the day it is made, if the sale is made under such notice, judgment and precept.

Counsel says that the averment that no notice was served as required by the constitution and laws is argumentative. He cannot say, that the averment that no such notice was recorded or given to the clerk is argumentative. But neither were so. Daniells speaks, page 363, of the looseness with which pleadings in Courts of Equity may consistently with the principles of those courts be worded; Again, at page 368, he says the same precision of statement is not required in bills in equity as in pleadings at law, and that what is necessary is that such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer.

In *Wescott* v. *Weeks*, 72 Ill., 524 (opinion by Mr. Justice Breese), it was decided that "although a case is

so defectively made by the bill in chancery that the court cannot fully comprehend it, and pronounce upon it with confidence, still if the court can see, from what is stated, that there is equity in the bill, *it is error to sustain a demurrer to the whole bill, for want of equity.*"

This is a leading case in Illinois, and it is founded on the most approved authorities.

Daniell says (Ch. Pr., p. 542): "The court some-"times declines to decide a doubtful question of title on "demurrer. In which case, the demurrer will be over-"ruled, without prejudice to any question. A demurrer "may also be overruled, with liberty to the defendant to "insist upon the claim presented by answer, if the alle-"gations of the bill are such that the case ought not to "be decided without an answer being put in."

So the court did in this case, but the defendant deliberately elected not to answer. *Daniell* says (Ch. Pr., p. 543): "A demurrer will lie wherever it is clear that, "taking the charges of the bill to be true, the bill would "be dismissed after hearing, but it must be founded on "this: That it is an absolute, certain and clear proposi-"tion that it would be so."

In the note it says with authorities, that "the demurrer must be founded on some strong point of law which goes to the absolute denial of the relief sought."

Lord Redesdale says (Mitford's Pl., 170): Whether a bill may be demurred to is sometimes a subject of serious and anxious consideration; and the preparation of a demurrer may require great attention, as if it extends in any point too far it must be overruled. * * *

"It often happens that a defendant cannot answer any material part of the bill, without overruling his demurrer; it being held that if a defendant answers to any part of a bill to which he has demurred, he waives the benefit of the demurrer; or if he pleads to any part of a bill before demurred to, the plea will overrule the demurrer."

And Daniells says (p. 583, Chap. XIV, Sec. 2): "A "defendant cannot in general, after he has answered the "original bill put in a general demurrer to the amended "bill: Because the answer to the original bill being still

"on the record, will, in fact, overrule the demurrer. "The defendant must in such case confine his demurrer "to the matter introduced by amendment." (See also p. 409).

In the final hearing (Transcript, pp. 20-21) the cause came on to be heard on the original bill and demurrer and plea as well as the amended bill. The defendant's demurrer was not confined to any part of the amended bill. He had answered the original bill which required answer under oath so far as to disclose his two tax deeds. His so-called plea was in fact an answer, responsive to the bill, put in under oath, admitting defendant's claim of title and discovering the deeds under which he claimed. It is a fixed rule, that if a defendant submits to answer, he must answer fully. Under the authorities above, this answer remaining on the file, overruled the demurrer to that extent. And, as the demurrer went to the whole bill it could not stand.

The case of the defendant below is too fine for modern practice. He declined to answer after he had asked for and especially obtained leave to answer in twenty days. He deliberately came into the court and stated that he had elected not to answer and submit the case to the judgment of the court upon the evidence. In such case it is evident that the defendant must have some strong and controlling point of law on which to ground his claim that relief shall not be granted upon the bill. Even at law, an imperfect statement of a right in the declaration, is cured by verdict. And in chancery an imperfect statement in the bill will not prevent the admission of evidence under it, and a decree based upon it, if the evidence warrant. The utmost that this appellant claims, is that the facts are imperfectly stated in the bill. See his recapitulation at page 13 of his brief. The first two divisions are based upon the idea, that when plaintiff alleged that he was seized in fee simple of the land, which according to Daniells and Stephen and Whitworth is an averment that he is possessed—which according to all the authorities is a pleading of the fact *according to its legal effect*—the appellant avers that this is an imperfect statement, and that in addition to *seizin* he should

have averred *a synonym*, possession. Next the counsel suggests, that the plaintiff has not offered to do equity; but to sustain that claim, he had to resort to a speaking demurrer, and even in his brief to claim that taxes were extinguished by the purchase, and that they had inured to the benefit of appellee. This is only a claim that the averment of the bill was an imperfect statement where it said (Transcript, p. 13): "There were no taxes unpaid upon said land for which sale could on that day have been made." And page 15: "There were no lawful taxes due or unpaid upon which said land could be or ought to have been sold on that day." Those averments were complete and sufficient. (*Henry Co.* v. *Winnebago Drain Co.*, 52 Ill., 302.) Those averments being true and admitted by the defendant, he is compelled to look to his "speaking demurrer" to find any suggestion that the sale discharged any taxes or in any manner inured to the plaintiff's benefit.

A case so deliberately withdrawn from the investigation of the court below in the ordinary way, a case in which the court below thought the averments to be wholly sufficient, and on the motion of the defendant granted to him twenty days' time in which to answer or plead, and therein set up the same matter stated in his demurrer, so as to preserve all his right, is not to be overruled and reversed by an appellate court upon a quibble on the meaning of words or upon a form of an averment.

The case as stated shows both deeds void for want of judgment; void for want of precept; void because there were no taxes unpaid on which either sale could have been made; void for want of notice to redeem as required by the Constitution and the laws; void because no such notice or evidence of service thereof was filed with or recorded by the Clerk of Cook County. The defendant admitted that the plaintiff did not know, and could not ascertain, for what taxes the pretended sales, if any, were made. The bill alleged that there were no taxes unpaid on which the sales could have been made. The defendant could have set up by answer, and stated any taxes that he claimed to have been then unpaid on which the sale could have been made. But, deliberately, after having obtained twenty days' time in which to set

up such claims by answer, he, after four days' deliberation, elected that he would not set up that there were any unpaid taxes; but that he would deliberately admit that there were no taxes unpaid on which such sales could have been made or either of them. If that ultimate fact had been proved by conclusive evidence on the trial, it could not have been made more clearly to appear than it now appears. And as it is clearly made to appear that the defendant below, the appellant here, has obtained from a person who could issue tax deeds two papers, one under seal and one of which the record shows no seal, each reciting sale for taxes, and being *prima facie* evidence that at the time of such sales, respectively, there were taxes due and unpaid, and has put them upon the record as *prima facie* evidence of such fact, when he, the appellant, defendant below, deliberately admits that there were no taxes upon which either sale could have been made, a court of equity could not do otherwise than remove the cloud from the fee simple title and seizin of the plaintiff in the bill. So far from there being some strong point of law to prevent relief below or require this court to reverse the decree and send the case back to that court, there is no point of law, strong or weak, that goes to such extent.

That the averments of the bill were sufficient, considering the position of the parties, and that the facts showing the plaintiff's equitable right to relief against a person who had obtained tax deeds, *prima facie* good, and recorded them to cloud plaintiff's title, when there were no taxes for which the land could be sold, no advertisement, no judgment, no precept, when no notice to redeem had been given, and no such notice or evidence thereof filed with or recorded by the county clerk were sufficiently stated, is shown by

Morgan v. *Smith*, 11 Ill., pp. 200, 201.
Henry Co. v. *Winnebago Drain Co.*, 52 Ill., 302.
Cooper Eq. Pl., 6; Story Eq. Pl., § 255.

All which is respectfully submitted.

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